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No. 97-209 JUL 31 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ROBERT J. TOLCHIN, individually and on behalf of all others similarly situated,

Petitioner,

—v.—

THE SUPREME COURT OF THE STATE OF NEW JERSEY, ROBERT WILENTZ (intended to be the Chief Judge of the Supreme Court of New Jersey) STEPHEN W. TOWNSEND (intended to be the Clerk of the Supreme Court of New Jersey), THE NEW JERSEY STATE BOARD OF BAR EXAMINERS, SAMUEL J. UBERMAN (intended to be the Assistant Secretary of the New Jersey Supreme Court who plaintiff believes to direct the State Board of Bar Examiners) THE NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION, and JOSEPH J. HOGYA (intended to be the Institute for Continuing Legal Education Skills Training Course Director),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The judgment below presents the following issues for review:

1. Does the United States Constitution permit a state to require lawyers duly licensed to practice law in the state to maintain a full-fledged office where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time?

2. Does such an in-state office requirement offend the dormant aspect of the Commerce Clause?

3. Does the United States Constitution permit a state to require lawyers duly licensed to practice law in the state and newly admitted to the state's bar to attend a two year long sequence of classes which are only offered within the borders of the state and which are usually presented on videotape which could just as well be presented outside the state or watched by lawyers on their own at home or in their offices?

PARTIES TO THE PROCEEDING

There are no parties to this case other than those appearing in the caption.

The defendant Robert W. Wilentz was at the time this action was commenced the Chief Judge of the Supreme Court of New Jersey. Since the commencement of this action, Judge Wilentz became ill and resigned from the bench. Subsequently, Judge Wilentz unfortunately passed away.[1]

After Judge Wilentz resigned from the bench, Deborah Poritz, who was the New Jersey Attorney General and who represented the state defendants in this action, was appointed Chief Judge of the Supreme Court of New Jersey.

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[1] The *New York Times* reported that Judge Wilentz died in his apartment in Manhattan. This is rather ironic, considering the position taken by the defendants in this case that in order to practice law in New Jersey a lawyer must have an office in New Jersey. If the Chief Judge could live in Manhattan and preside over a court in New Jersey, why should lawyers not be permitted to have their offices in Manhattan and practice in New Jersey?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ROBERT J. TOLCHIN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioner,

-against-

SUPREME COURT OF NEW JERSEY, ROBERT N. WILENTZ (INTENDED TO BE THE CHIEF JUDGE OF THE SUPREME COURT OF NEW JERSEY), STEPHEN W. TOWNSEND (INTENDED TO BE THE CLERK OF THE SUPREME COURT OF NEW JERSEY), NEW JERSEY STATE BOARD OF BAR EXAMINERS, SAMUEL J. UBERMAN (INTENDED TO BE THE ASSISTANT SECRETARY OF THE NEW JERSEY SUPREME COURT WHO PLAINTIFF BELIEVES TO DIRECT THE STATE BOARD OF LAW EXAMINERS), NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION AND JOSEPH J. HOGYA (INTENDED TO BE THE INSTITUTE FOR CONTINUING LEGAL EDUCATION SKILLS TRAINING COURSE DIRECTOR),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of the judgment of the United States Court of Appeals for the Third Circuit, *Tolchin v. The Supreme Court of the State of New Jersey*, 111 F.3d 1099; 1997 U.S. App. LEXIS 9831 (3d Cir. 1997) (1a*), which affirmed the judgment of the United States District Court for the District of New Jersey dated December 14, 1995 (41a), which in turn adopted the report and recommendation of the Magistrate Judge, *Tolchin v. The Supreme Court of the State of New Jersey* 1995 U.S. Dist. LEXIS 21518 (D.N.J. 1996) (Cavanaugh, U.S.M.J.) (43a).

STATEMENT OF JURISDICTION

In seeking review of the judgment of the United States Court of Appeals for the Third Circuit, petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

The judgment which the plaintiff seeks to have reviewed was entered by the Clerk of the United States Court of Appeals for the Third Circuit on May 2, 1997, the same day as the opinion of that court was filed. This

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* Parenthetical page references denominated with an 'a' refer to pages of the appendix at the back of this petition.

petition is timely since it is being brought within 90 days of that date.

There have been no applications for rehearing.

STATEMENT OF THE CASE

Jurisdiction

This is a civil rights case arising under 42 U.S.C. §§ 1983 and 1985. Jurisdiction in the court of first instance was based on federal question jurisdiction, 28 U.S.C. § 1331, as this case arises under a federal statute and the United States Constitution.

Introduction

The State of New Jersey has vested the authority to regulate lawyers and the practice of law in the Supreme Court of the State of New Jersey ("New Jersey Supreme Court"). New Jersey Constitution, art. 6, § 2, ¶ 3. Exercising this authority, the New Jersey Supreme Court has adopted rules regulating the practice of law commonly known as the New Jersey Rules of Court.

Two of these rules are at issue in this case. The first, N.J. Ct. R. 1:21-1 (1997), more commonly known as the bona fide office rule, requires a lawyer holding a license to practice law in the State of New Jersey to maintain an office in the State of New Jersey, without regard to the needs of the lawyer's practice.

Few would be surprised to learn that a lawyer who wishes to practice law in the State of New Jersey must be graduated from an accredited law school, pass the New Jersey bar exam, pass the scrutiny of the character and fitness screening process and take an oath to support the laws of the State of New Jersey and the Constitution of the United States of America. Likewise, few would be surprised to learn that a lawyer who does not reside in New Jersey must designate the Clerk of the Supreme Court of the State of New Jersey ("New Jersey Supreme Court") as his or her agent for the service of process.

What many do find astonishing in this era of information technology, rapid communication, super-highways and jet air travel is that without regard to the nature of a particular lawyer's practice or the lawyer's geographic location, New Jersey requires duly licensed lawyers who wish to actually practice law in the State of New Jersey to maintain a "bona fide office" someplace within the State of New Jersey, N.J. Ct. R. 1:21-1 (1997), and to complete a series of courses which are only offered within the geographic borders of the State of New Jersey, N.J. Ct. R. 1:26 (1997). A lawyer who fails to comply with these requirements is given a status of "ineligible to practice" and is subject to disciplinary action if he or she should practice law within New Jersey.

The Bona Fide Office Rule

The office requirement cannot be satisfied by arranging for a maildrop or an answering service. The rule

requires a lawyer to maintain an actual office within the state where the lawyer can be reached and is actually present on a regular basis. A "bona fide office" is defined in the rule as:[1]

> more than a maildrop, a summer home that is unattended during a substantial portion of the year, an answering service unrelated to a place where business is conducted or a place where an on-site agent of the attorney receives and transmits messages only. For the purpose of this section, a bona fide office is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time.

N.J. Ct. R. 1:21-1 (1997).

This bona fide office requirement places an onerous burden on lawyers whose offices are located outside New Jersey and who wish to devote part of their time to

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[1] During the pendency of this action, the bona fide office rule was amended so that it is now even more stringent then it was at the time this action was commenced. The amended version was enacted on June 28, 1996 and became effective September 1, 1996, just ten days before this matter was argued in the Third Circuit. The Third Circuit was made aware of the amendment and its decision addressed the current version, rather than the older version which is no longer in effect. Both versions are reproduced for this Court in the "Statutes Involved" section of this petition.

practicing law in New Jersey. For example, a lawyer (such as the plaintiff in our case) with an office in Manhattan who holds a New Jersey license to practice law may wish to represent a long-standing New York client in a matter that requires him to practice law in New Jersey, such as a lawsuit pending in a New Jersey court, an arbitration venued in New Jersey, a federal administrative proceeding being held in New Jersey, a corporate merger closing in New Jersey or negotiation of a labor dispute with a labor union headquartered in New Jersey. Despite the fact that the Manhattan lawyer has relatively easy access to the entire northern part of the State of New Jersey and can in fact arrive at the Federal District Court in Newark within thirty minutes on the PATH train,[2] that lawyer is prohibited from undertaking such representation because he does not have an office in New Jersey. This office requirement is imposed notwithstanding the fact that the lawyer is every bit as able to represent his client from his New York office and his New York office is most convenient for his client. The result is that if this lawyer wishes to represent his client in New Jersey, he is compelled to hire a local New Jersey lawyer who need not actually do anything other than lend his name as counsel

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[2] The PATH train is a rail link under the Hudson River operated by the Port Authority of New York and New Jersey, a quasi-governmental authority jointly owned by the states of New York and New Jersey in recognition of the fact that New York and New Jersey comprise one economic market within which commerce must be facilitated rather than hindered as is the effect of the "bona fide office" requirement.

of record and his office address to satisfy the bona fide office rule.

This scenario may be both satisfactory and immensely profitable to lawyers with offices in New Jersey who are able to parlay their captive New Jersey market into a lucrative source of fees from the clients of out-of-state lawyers who have legal matters in New Jersey. However, this bona fide office rule improperly encroaches upon the Constitutional right of lawyers licensed to practice in New Jersey but who have offices outside New Jersey to conduct their business in New Jersey, and particularly offends the Constitution's Commerce Clause, U.S. CONST., art I, § 8, clause 3.

This litigation pressed the defendants to identify what purpose the bona fide office requirement serves and to make a showing that some legitimate state interest justifies the infringement of the right of lawyers with out-of-state offices to do business in New Jersey. The defendants took the position that the bona fide office rule is allegedly necessary in order to assure "competence, accountability and accessibility of attorneys for the benefit of clients, courts, counsel and parties." *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099, 1109 (3d Cir. 1997) (21a).

Relying on this Court's decisions in *Frazier v. Heebe*, 482 U.S. 641, 649 (1987) ("the mere fact that an attorney has an office in [a jurisdiction] surely does not warrant the assumption that he or she is more competent than an out-of-state member of the state bar."), *Barnard v.*

Thorstenn, 489 U.S. 546, 555 (1989) ("We can assume that a lawyer who anticipates sufficient practice in[a jurisdiction] to justify taking the bar examination and paying the annual dues . . . will inform himself of the laws of the [jurisdiction].") and *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 (1985) (Court will not assume that "a nonresident lawyer — any more than a resident — would disserve his clients by failing to familiarize himself with the [local law]."), the Third Circuit rejected the defendants' arguments that the bona fide office requirement makes lawyers more competent. *Tolchin*, 111 F.3d at 1108-09, (20a).

The Third Circuit also rejected the defendants' argument that the bona fide office requirement increased attorney accountability, since New Jersey already requires all non-resident lawyers to designate the Clerk of the New Jersey Supreme Court as agent for service of process. *Tolchin*, 111 F.3d at 1109, (20a-21a) (citing N.J. Ct. R. 1:21-1(a)).

The Third Circuit nevertheless upheld the bona fide office requirement for reasons hinging entirely on the notion that requiring a lawyer to have an office in New Jersey somehow "has a rational relationship to the benefit of attorney accessibility for clients, courts, counsel and parties." *Tolchin*, 111 F.3d at 1009 (21a). The Court did not explain why requiring a lawyer licensed to practice in New Jersey but whose office is in Manhattan or Philadelphia to establish an office in New Jersey would

necessarily make the lawyer any more accessible to clients, courts, counsel or parties.

The obvious fallacy pervading the Third Circuit's reasoning is that requiring a lawyer to ensconce herself in an office somewhere in New Jersey does not necessarily make that lawyer more accessible than many lawyers with out-of-state offices. For example, a lawyer could satisfy the bona fide office requirement by having an office in Atlantic City, New Jersey, approximately two hours south of New York City, but that lawyer would be far less accessible to a court in a northern New Jersey city such as Newark, Jersey City or Hackensack than a lawyer with an office in Manhattan, who would be scarcely half an hour away. Similarly, a lawyer with offices in Philadelphia would be far more accessible to courts in southern New Jersey than a lawyer with an office satisfying the rule in northern New Jersey. If the rule required lawyers to have an office located within a specified number of miles from any courthouse where they wished to practice law, one could see how such a requirement would assure attorney accessibility. However, the rule followed in New Jersey does not bear a rational relationship to the ends of attorney accessibility. *See, Frazier* v. *Heebe,* 482 U.S. 641 2613 (1987) (holding that an in-state office requirement is "irrational").

It is indisputable that a New Jersey court wishing to communicate with a lawyer located out-of-state need only send a letter through the mail, send a fax or call on the telephone. The mails are no less reliable when they

cross state lines, faxes work just as well and inter-state telephone charges are no longer prohibitive as they were a generation or two ago.[3]

The Third Circuit also failed to consider that the vast majority of lawyers, other than trial lawyers, are not litigators and thus rarely, if ever, need to be accessible to a court in the first place. Lawyers who draft wills, trusts or contracts, negotiate real estate transactions or corporate mergers and acquisitions, practice corporate, securities, labor, or customs law, engage in tax planning or specialize in federal appellate advocacy almost never have matters that require them to be accessible to a New Jersey court. Similarly, specialized lawyers who engage in practice before federal administrative forums such as Veterans' Administration, Social Security or Immigration and Naturalization Service hearings have little reason to be required to be accessible to New Jersey courts. Yet all these lawyers are required by the bona fide office rule to maintain an office in New Jersey or be precluded from engaging in such practice of law in New Jersey.

In contrast, Delaware's parallel to New Jersey's bona fide office rule permits licensed lawyers with offices out-of-state to practice law within the State of Delaware, with the narrow caveat that all papers filed with a

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[3] This is particularly so between New York and New Jersey, where the same telephone company, NYNEX, serves the New York City metropolitan area, including the northern portion of New Jersey, in recognition of the fact that the northern half of New Jersey forms part of the same natural market as New York City.

Delaware court must be signed by an active member of the Delaware Bar who has an in-state address where papers can be served, i.e. not a post office box. DEL SUP. CT. R. 12(a)(i).

Requiring a lawyer to be present at an office in New Jersey also fails to enhance the lawyer's accessibility to her clients, particularly if her clients are also out-of-state. A lawyer with a license to practice law in New Jersey who has an office in Brooklyn, New York is obviously more accessible to her Brooklyn clients, who would find her most inaccessible if her office were located someplace in New Jersey. Similarly, requiring a lawyer who is in-house counsel for a corporation whose law office is located within the headquarters of the corporation in Manhattan to also maintain an office in New Jersey in order to represent that corporation in a proceeding in New Jersey does nothing to make that lawyer more accessible to her corporate client and is patently absurd.

This rule should also not be considered in a vacuum. The most recent version of this rule was promulgated in 1996, when fax machines, telephones, high-speed railroads and highways, conference calls, speakerphones, e-mail and cellular telephones had already been pervasive for many years. Even if the idea of requiring an office might have served to assure attorney accessibility in a bygone and slower era, the rule has become so unnecessary in today's world that it cannot be said to bear even a rational relationship to the ends of assuring attorney accessibility.

The plaintiff submits that the real motivation behind the bona fide office requirement is plain and simple economic protectionism: New Jersey's Bar establishment enacted these rules to protect local New Jersey lawyers and to promote full employment among local members of the New Jersey Bar of New Jersey. The New Jersey Bar is obviously concerned that the large firms in Manhattan and Philadelphia will simply hire lawyers who took the New Jersey bar exam and who are licensed to practice in New Jersey, rather than hire local New Jersey lawyers to serve as counsel of record. Even the Third Circuit recognized that "it may be true, as Tolchin argues, that the bona fide office requirement may include an element of economic protectionism," *Tolchin*, 111 F.3d at 1116 (39a). At the very least this question raises a question of fact that should have been left for the jury and should not have been decided by the court below on a summary judgment motion.

The Mandatory Attendance Rule

Besides imposing an oppressive in-state office requirement on duly licensed lawyers wishing to practice law in New Jersey, the defendants also impose a requirement that lawyers newly admitted to the New Jersey bar complete a two year series of continuing legal education classes called "Skills and Methods" that must be attended at locations within the state of New Jersey. N.J. Ct. R. 1:26 (1997). Failure to complete these courses

makes a lawyer ineligible to practice in New Jersey until the courses are completed. *Id.*

Skills and Methods classes are only offered within the State of New Jersey, frequently at remote points within the state. Only a handful of the lectures are presented with a live lecturer, and those few live lectures are straight lectures with no opportunity for questioning the lecturer. The vast majority of the classes are presented on video tape, and most participants complete the entire series of classes without ever seeing a live lecturer. The only evaluation of a student's performance in the courses is done on the basis of mail-in homework assignments that can clearly be done just as easily within or without the borders of the State of New Jersey.

There is a strict requirement that all participants in the Skills and Methods program attend the lectures. This requirement is called the mandatory attendance rule.

The defendants proffered absolutely no evidence showing that any state interest is served by requiring newly admitted lawyers to make weekly trips from wherever they live to a classroom in New Jersey to watch videotaped lectures. The same result could be achieved by simply selling or renting the videotapes to out-of-state lawyers who can then watch them at home, complete the homework and get the same educational benefit.

While the defendants argue that the mandatory attendance rule does not impose a great burden on out-of-state members of the New Jersey Bar, one need only consider the plight of a young lawyer who passed the

New Jersey bar exam immediately after law school, has become admitted to the New Jersey bar and who intends to practice law in New Jersey after completing a two year clerkship in the United States District Court for the Eastern District of Louisiana or the Northern District of New York. Because such a young lawyer cannot, practically speaking, attend the lectures which are offered only in New Jersey, he is destined to become ineligible to practice law in New Jersey and will foreclosed from practicing there. The same would apply to a lawyer with many years experience from another state who wished to move to New Jersey.

The result of the mandatory attendance requirement is that the New Jersey market for legal services is reserved for local New Jersey lawyers. This is exactly what the Commerce Clause was intended to prevent. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 614 (1978) ("[R]egulations that operate as economic protectionism and serve to protect in-state economic interests at the expense of out-of-state competitors are per se invalid.")

The rule that imposes the Skills and Methods requirement also directs the defendant New Jersey State Board of Law Examiners to promulgate rules governing this course, including a curriculum. The defendants admit that no such rules were ever promulgated. The course is administered by the defendant Institute for Continuing Legal Education ("ICLE") according to an *ad hoc*

arrangement with the defendant New Jersey Supreme Court.

Obviously, if there were a defined curriculum for the course and a written list of requirements, it would be a simple matter for law schools and bar associations around the country to offer courses satisfying the Skills and Methods requirement. Indeed, the record contains the affidavit of a past president of the New York State Trial Lawyers Association who states that if there were such a curriculum available, his organization would offer a New Jersey Skills and Methods course in New York.

However, because there is no defined curriculum or rules governing the course, the only organization in the world which offers this course is the defendant ICLE.

REASONS FOR GRANTING THE WRIT

This case raises for this Court's review the constitutionality of two rules adopted by a state court in its regulatory capacity that substantially hinder the ability of lawyers to engage in interstate commerce in the practice of law. This Court has never reviewed these rules nor any similar rules.

In deciding to uphold these burdensome and restrictive New Jersey regulations, the Third Circuit decided an important question of federal law that has not been, but should be, settled by this Court.

Twelve years ago, this Court adjudged as unconstitutional a New Hampshire regulation prohibiting duly licensed lawyers from practicing law in New Hampshire if they did not reside in New Hampshire. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). In his opinion concurring in result, Justice White wrote "I would postpone to another day such questions as whether the State may constitutionally condition membership in the New Hampshire Bar upon maintaining an office for the practice of law in the State of New Hampshire." *Id.*, 470 U.S. at 289 (White, J.) (concurring in result).

The petitioner respectfully submits that the future day referred to by Justice White for determining the validity of in-state office requirements has now come. The arrival of this day has been heralded by the defendants' having increased the stringency of their enforcement of the bona fide office rule and their having actually re-written the bona fide office rule to make it even more difficult for New Jersey licensed lawyers practicing in another state to comply with since the commencement of this action. There are thousands of lawyers licensed to practice law in New Jersey but whose primary offices are located outside New Jersey and who are therefore impacted by this rule and the defendants' increased enforcement of this rule. This rule is now quite ripe for review by this Court.

It should be noted that the *Piper* case did not involve a in-state office rule. The rule being challenged in

Piper was purely a residency requirement. Nevertheless, Justice White's comment was prescient since he obviously foresaw that once residency requirements for practicing law were held to be unconstitutional, states might adopt in-state office requirements as a fallback line of protectionism. This is exactly what New Jersey did after the New Jersey Supreme Court declared "unreasonable" New Jersey's previous requirement that non-resident attorneys maintain a "principal office" within New Jersey. *In re Sackman*, 90 N.J. 521, 448 A.D.2d 1014 (1982). Since in-state office requirements were not raised in the *Piper* case, the Court quite properly did not consider them.

This is the only case that the petitioner is aware of dealing with an in-state office requirement.

Similarly, New Jersey's requirement that newly admitted lawyers complete a two year sequence of classes that can only be taken in New Jersey—where they are almost always presented on videotape in a classroom—imposes a constitutionally unacceptable burden on newly admitted lawyers who do not reside in or very close to New Jersey. This issue has never been reviewed by this Court.

This issue is also particularly ripe for review because the Third Circuit based its decision upholding the mandatory attendance requirement on what the Third Circuit acknowledged was dicta repeated in three decisions of this Court which articulated approval of a requirement of mandatory attendance at legal education seminars.

Tolchin, 111 F.3d at 1109-10, n.4 and n5 (22a, 24a). However, nothing in any of those three cases, *Supreme Court of Virginia* v. *Friedman*, 487 U.S. 59, 69 (1988); *Frazier* v. *Heebe*, 482 U.S. 641, 648, (1987); *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 285 n.19 (1985), indicates this Court's approval of a requirement that newly admitted out-of-state lawyers attend a two year sequence of lectures offered only at locations within New Jersey. These other decisions contemplated the approval only of a continuing legal education requirement—which is indisputably a laudable objective—and perhaps at most an occasional requirement of attendance at an in-state seminar. The reliance placed on these decisions by the Third Circuit is a perversion of what this Court appears to have intended in writing the dicta contained in *Friedman*, *Frazier* and *Piper*. Such a mis-application of this Court's holdings beckons now for review.

The two New Jersey requirements that the Third Circuit's decision upheld are both offensive to the freedom of commerce for goods and services between the states envisioned by the framers of the Commerce Clause. As Alexander Hamilton wrote in The Federalist, No. XXII:

> The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse

> between the different parts of the Confederacy. «The commerce of the German empire is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandises passing through their territories, by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless.» Though the genius of the people of this country might never permit this description to be strictly applicable to us, yet we may reasonably expect, from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.

THE FEDERALIST NO. 22 (Alexander Hamilton) (footnote omitted).

The Third Circuit recognized in its decision that well-established precedent holds that a state regulation imposing a burden on interstate commerce which is excessive in comparison to the local benefits achieved violates the Commerce Clause. *Tolchin*, 111 F.3d at 1107 (14a). *See Pike v. Bruce Church*, 397 U.S. 137 (1970). The Third Circuit also recognized that:

> when a state statute "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," it may generally be struck down without further inquiry. *[Brown-Forman Distillers Corp. v. New York Liquor Authority,]* 476 U.S. [573] at 578-79 [(1986)]; *see also Institutional Sys., Inc. v.*

> *Computer Curriculum Corp.*, 35 F.3d 813, 824 (3d Cir. 1994). On the other hand, when a statute only indirectly affects interstate commerce and regulates evenhandedly, a determination must be made as to whether the State's interest is "legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman*, 476 U.S. at 579 (citing *Pike*, 397 U.S. at 142). In both cases, however, "the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.*

Tolchin, 111 F.3d at 1106 (14a).

There is little doubt that if heightened scrutiny were applied to the regulations at issue, the regulations, particularly the bona fide office rule, would have to be stricken since they clearly place a burden on interstate trade.

However, even applying the more lenient standard of review applied by the Third Circuit—whether the regulations bear a rational relationship to a legitimate local purpose, *see Pike*, 397 U.S. at 142—these regulations should have been stricken.

Indeed, the Third Circuit's decision that the bona fide office rule was rationally related to the local objective of assuring attorney accessibility to local courts, clients, parties and lawyers, *see Tolchin*, 111 F.3d at 1109 (21a), directly contradicts the holding of this Court in *Frazier v. Heebe*, 482 U.S. 641. In that case, this Court was presented with a challenge to a local rule of the United States District Court for the Eastern District of Louisiana

which required attorneys who did not reside in the District to maintain an office within the geographic borders of the District in order to be a member of the bar of that court. The defendants in *Frazier* attempted to justify their in-state office requirement on grounds that were substantially similar to the four grounds relied upon by the defendants and the Third Circuit in our case. Nevertheless, this Court rejected the *Frazier* in-state office requirement, and found in language directly applicable to the case at bar:

> the in-state office requirement [is] unnecessary and irrational. First, the requirement is not imposed on in-state attorneys. A resident lawyer is allowed to maintain his or her only office outside of Louisiana. A resident lawyer with an out-of-state office is equally as unavailable to the court as a nonresident lawyer with an out-of-state office. In addition, the mere fact that an attorney has an office in Louisiana surely does not warrant the assumption that he or she is more competent than an out-of-state member of the state bar. Requiring petitioner to have a Louisiana address and telephone number and an in-state answering service will not elevate his or her understanding of the local Rules. As the failure to require in-state attorneys to have an in-state office reveals, the location of a lawyer's office simply has nothing to do with his or her intellectual ability or experience in litigating cases in Federal District Court.
>
> We further conclude that any need the court may have to ensure the availability of attorneys

> does not justify the in-state office requirement. As observed with regard to state residency requirements, there is no link between residency within a state and proximity to a courthouse. The office requirement does not specify that counsel *be* in the Eastern District, but only that the attorney have an office somewhere in the state, regardless of how far that office is from the courthouse. Thus, we conclude that neither the residency requirement nor the office requirement of the local Rules is justified.

Id., 482 U.S. at 649-650, 107 S.Ct. 2607 (1987) (underline added, italics in original).

While the New Jersey requirements, unlike the Louisiana requirements dealt with in *Frazier*, do not exempt New Jersey residents from the office requirement,[4] this Court's perceptive analysis in *Frazier*

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[4] While the New Jersey requirements do not today exclude non-residents of New Jersey from practice, the regulatory history of the rule being challenged here reveals that in fact non-domiciliaries of New Jersey were excluded from the practice of law there until 1969, when the rule was changed to a requirement of either domicile in New Jersey or the maintenance of one's principal office in New Jersey, a requirement slightly more onerous than the one found to be irrational in *Frazier*. It was not until 1978 that the rule was changed to its present form, except that the portion defining what a "bona fide office" is was not added until 1981. *See Matter of Kasson*, 141 N.J. 83 660 A.2d 1187 (1995) Thus, the history of the regulation now at issue demonstrates that the current rule was spawned from a lineage of outrightly protectionist measures that facially discriminated based on state residence, in violation of the Privileges and Immunities Clause.

As explained by the New Jersey Supreme Court, "The additional [bona fide office] requirement was seen as a means of controlling the occasional practice of law by domiciliaries who

(continued next page)

of the lack of any rational reason to require a lawyer to maintain an office within in a jurisdiction as a precondition to membership in that jurisdiction's bar is completely applicable to this case. As was observed in *Frazier*, the mere fact that a lawyer such as the plaintiff might rent an office in New Jersey, install a telephone, hire a secretary and even seat himself at a desk in that office on a scheduled basis does not bestow on that lawyer any advantage. All it does is create a built-in inconvenience for any lawyer who wants to practice in New Jersey, and makes many lawyers think twice about becoming admitted to practice in New Jersey.

Likewise, the mandatory attendance requirement simply throws up an obstacle inhibiting and discouraging lawyers with offices outside of New Jersey from becoming admitted to the New Jersey Bar and/or practicing law in New Jersey. The record in this case contains no showing whatsoever that there is any benefit obtained from requiring out-of-state lawyers to journey into New Jersey for the purpose of watching a videotape in a classroom located in New Jersey. Indeed, what the record does contain is the unrefuted affidavit of Frank Macchiarola, Ph.D., an expert in legal education, [now former] law school dean, former law professor and former Chancellor of the New York City Board of Education, who stated

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primarily practiced in other jurisdictions or who practiced law only sporadically in New Jersey", *Kasson*, 141 N.J. at 90, 448 A.2d at 1017 (citing Pressler, Current N.J. Court Rules, Comment 1:21-1 (1982)). Clearly, this is as protectionist a motive as any other tariff designed to control the market and serves no other legitimate function.

categorically that there were no educational benefits to be obtained from watching a videotape in a classroom in New Jersey as compared to being permitted to watch the same videotapes at a classroom outside New Jersey or in one's own home or office.

The decision of the Third Circuit should be reviewed by this Court since it reached conclusions regarding state regulation of the interstate practice of law that have never been addressed by this Court. These regulations implicate the dormant aspect of the Commerce Clause and thus raise important questions of federal law.

This matter is appropriate for review by this Court also because of the great many people who are impacted by the regulations being challenged here. There are tens of thousands of lawyers in the New York and Philadelphia metropolitan areas, and thousands of law firms. Many of these lawyers and law firms are forced to maintain New Jersey offices that they would not otherwise maintain if it were not for the burden imposed by this rule. Many more lawyers and law firms are forced by these regulations to forego undertaking representation of clients when the matters would require practicing law in New Jersey. On the other side of the issue, thousands of New Jersey local lawyers are making monopolists' profits by taking advantage of the infringement of free commerce between the states that is engendered by these regulations.

Finally, it should be noted that this matter is particularly worthy of review by this Court since the

regulations at issue here, unlike the run-of-the-mill social or economic legislation with respect to which states enjoy wide latitude, will not likely "eventually be rectified by the democratic process," *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). These protectionist rules were made by non-legislative fiat of the Supreme Court of New Jersey, which is comprised entirely of local New Jersey lawyers, and were cleverly crafted to place no significant burdens upon the members of the local New Jersey bar while at the same time burdening lawyers from other states who may wish to practice in New Jersey.

Ordinary lawyers, out-of-state or in-state, have little to no voice at all in making these rules, and it is extremely unlikely that out-of-state lawyers would be able to convince the New Jersey Supreme Court to even consider repealing these rules, which have the locally popular protectionist effect of excluding non-New Jersey lawyers from practicing in New Jersey and of preserving New Jersey as a fiefdom where local lawyers do not have to compete with out-of-state lawyers who are members of the New Jersey bar, although such lawyers—particularly New York and Philadelphia lawyers—may be perfectly able to handle cases in New Jersey. Since any undue burdens created by these rules are unlikely to be ever rectified by legislative means," this Court should review this case.

CONCLUSION

For the reasons set forth herein, petitioners respectfully request that this Court grant a writ of certiorari to the United States Circuit Court for the Third Circuit.

Dated: New York, New York
July 30, 1997

Respectfully submitted,

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APPENDIX

Decision of the United States Court of Appeals

for the Third Circuit

No. 95-5883

ROBERT J. TOLCHIN, individually and on behalf of all others similarly situated

Appellant,

v.

THE SUPREME COURT OF THE STATE OF NEW JERSEY; ROBERT WILENTZ (intended to be the Chief Judge of the Supreme Court of New Jersey); STEPHEN W. TOWNSEND (intended to be the clerk of the Supreme Court); THE NEW JERSEY STATE BOARD OF BAR EXAMINERS; SAMUEL J. UBERMAN (intended to be the Assistant Secretary of the New Jersey Supreme Court who plaintiff believes to direct the State Board of Bar Examiners); THE NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION; JOSEPH J. HOGYA (intended to be the Institute for Continuing Legal Education Skills Training Course Director)

APPEAL FROM THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 94-cv-04860)

ARGUED SEPTEMBER 10, 1996

BEFORE: SLOVITER, *Chief Judge*, COWEN and LEWIS, *Circuit Judges*.

(Filed May 2, 1997)

OPINION OF THE COURT

LEWIS, *Circuit Judge*.

To practice law in New Jersey, an otherwise qualified attorney must maintain an office and attend continuing legal education courses there. The question before us is whether such requirements are lawful. We conclude that they are, and thus will affirm the district court's grant of summary judgment in favor of the Appellees. I. Rule 1:21-1(a) of the Rules Governing the Courts of the State of New Jersey (the "Rule") indicates who may practice and appear in New Jersey courts. The New Jersey Supreme Court amended this Rule, effective September 1, 1996, while this appeal was pending. The

Rule now states that

> no person shall practice law in this State unless that person is an attorney, holding a plenary license to practice in this State, has complied with the R.1:26 *skills and methods course requirement* in effect on the date of the attorney's admission, is in good standing, and *maintains a bona fide office* for the practice of law in this State regardless of where the attorney is domiciled.

N.J.Ct.R. 1:21-1(a) (1996) (emphasis added).

A.

The Bona Fide Office Requirement

The Rule defines "bona fide office" as "more than a maildrop, a summer home that is unattended during a substantial portion of the year, an answering service unrelated to a place where business is conducted, or a place where an on-site agent of the attorney receives and transmits messages only." *Id.*

The Rule also outlines some indicia of a bona fide office. It

> is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be

obtained within a reasonable period of time.

Id.

The bona fide office requirement is the successor to New Jersey's more stringent residency requirement for members of the New Jersey bar. Indeed, as we discuss below, over the years New Jersey has sought to diminish the disparity in treatment between resident and nonresident attorneys. Moreover, the history of New Jersey's residency and bona fide office requirements demonstrates the interests at stake in this case. As we will explain, each revision has sought to strike a different balance of the public interest, the interests of the New Jersey bar and the interests of potential members of the bar. Because those interests are at the core of the dispute in this case, we will briefly trace the relevant history and meaning of the various revisions to the Rule.

At the outset we note that until 1969, New Jersey required that attorneys be residents of New Jersey in order to practice there. *In re Sackman*, 448 A.2d 1014, 1017 (1982); *see* Pressler, Current New Jersey Court Rules, Comment R. 1:21-1 (1969). The rationale for this requirement was that "residence in New Jersey implies a community commitment in terms of both interest and activity which better serves local clients and their interests." Editorial, Proposed Revision of the Rules of the Court, 90 N.J.L.J. 164 (1967) ("1967 Editorial"). Supporters of the residency requirement maintained that it ensured that the general public had access to qualified and committed counsel. *Id.* But while the residency

requirement was in effect until 1969, the New Jersey Supreme Court had been considering revising it since 1960.

In 1960, the New Jersey Supreme Court appointed the Coordinating Committee on the Revision of the Rules of Court to review the state's rules of court, including the residency requirement. *Sackman*, 448 A.2d at 1017.

In 1966, The Committee recommended that the residence requirement be modified so that a nonresident attorney could practice law in New Jersey as long as he or she was "in regular attendance at an office in this state maintained for the practice of law." 1967 Editorial; *see Sackman*, 448 A.2d at 1017. This proposed revision was intended to benefit attorneys who chose to live in New York or Pennsylvania and to practice in New Jersey. 1967 Editorial. These attorneys argued that the residency requirement placed an unreasonable restriction on their choice of residence because they were equally — if not more — qualified to practice in New Jersey than resident attorneys who primarily practiced in another state. *Id.* The proposed revision was tailored to prevent the occasional practice of law by those who practiced primarily in another state. *Sackman*, 448 A.2d at 1017.

The 1966 recommendation was criticized for several reasons. First, it was unclear what "regular attendance" meant. 1967 Editorial. Critics suggested that the proposed revision would allow attorneys who predominantly practiced in New York or Philadelphia to meet the requirement by attending a New Jersey office on

a regular but infrequent basis. *Id.* Furthermore, some members of the New Jersey bar feared that this revision would make it more difficult for people to secure qualified and committed counsel. *Id.* They believed that New Jersey residents would be better served by local counsel who would be "presumably, better equipped, in terms of currency and facility with New Jersey law and practice." *Id.* Finally, the proposal was criticized because of its "adverse impact on the economic interests of the New Jersey bar . . . ." *Id.* The proposal was not implemented.

In 1969, the Coordinating Committee proposed another revision which allowed any attorney to practice in New Jersey who was either domiciled there or maintained his or her principal office there. *Sackman*, 448 A.2d at 1017. While allowing for a more expansive choice of residence for members of the New Jersey bar, this recommendation implicitly rejected the possibility of attorneys engaging in multi-state practice. *Id.* The New Jersey Supreme Court implemented this recommendation. *Id.*

However, the 1969 Rule failed to limit multi-state practice completely. Some attorneys practiced in New Jersey by virtue of their residency in the state, but did not maintain a bona fide office there either because their office was in another state or because their New Jersey practice was irregular. Pressler, Current New Jersey Court Rules, Comment R. 1:21-1 (1982).

Thus, effective September 1978, the Rule was amended again to require that a resident attorney maintain

a bona fide office in New Jersey and that a nonresident attorney maintain his or her principal office there. *Id.* This version of the Rule was more restrictive of nonresidents than of residents because only the former had to maintain their principal offices in New Jersey. As a result of this requirement, a nonresident attorney's New Jersey practice could not be subordinate to a practice in another state. *Id.*

"Bona fide office" was not defined in the 1978 Rule, leading to another amendment in September, 1981. This amendment defined a bona fide office as

> a place where the attorney or a responsible person acting on his behalf can be reached in person and by telephone during normal business hours. A bona fide office is more than a maildrop, a summer home that is unattended during a substantial portion of the year, or an answering service unrelated to a place where business is conducted.

Sackman, 448 A.2d at 1018; N.J.Ct.R. 1:21-1(a) (1983).

In 1982, the New Jersey Supreme Court, as part of its decision in *Sackman*, amended the Rule again in order to excise the facial discrimination against nonresidents. Under the revised Rule, both residents and nonresidents had to maintain bona fide offices in New Jersey in order to practice there. *Sackman*, 448 A.2d at 1019.

Before the *Sackman* revision, the Rule presumed that without a principal office in New Jersey, an attorney would lose contact with New Jersey law and procedure, and would therefore be unable to serve clients competently. *Id.* But the Court observed that to the extent

this premise might be true, it is only marginally true. *Id.* at 1021. The Court concluded that "the public would be better served if licensed New Jersey attorneys residing, for example, in New York and Philadelphia were subject to no greater restrictions in their practice in New Jersey than those residing in Newark and Camden" because more qualified attorneys would be available to the New Jersey public. *Id.* at 1019.

From 1982 to 1996, the only official changes made to the Rule were not substantive. However, in 1994, following a formal hearing concerning a bar member who had attempted to satisfy the bona fide office requirement by renting, but not actually using, office space in New Jersey, the Committee on Attorney Advertising, appointed by the New Jersey Supreme Court, issued Opinion 19 to clearly define "bona fide office." 138 N.J.L.J. 320. The Committee recommended that the attorney be disciplined and stated that a bona fide office had to be "a place where clients are met, files are kept, the telephone is answered, mail is received and a responsible person acting on the attorney's behalf can be reached during normal business hours." *Id.* In 1996, the New Jersey Supreme Court adopted the substance of Opinion 19 in its revision of the Rule. N.J.Ct.R. 1:21-1 (1996).

Thus, there is no question that over the last few decades, New Jersey has sought to reduce facial discrimination against nonresident attorneys. There is also no question that the bona fide office requirement imposes at least some restriction on all attorneys who

wish to practice in New Jersey. One of the issues in this appeal is the extent to which these restrictions impose a burden that unconstitutionally discriminates against nonresident attorneys.

B.

The Continuing Legal Education Mandatory Attendance Requirement

In addition to the bona fide office requirement, successful completion of the skills and methods course on New Jersey practice is required for all attorneys recently admitted to the New Jersey bar. N.J.Ct.R. 1:26. The course is intended to prepare attorneys for the transition to legal practice in New Jersey from law school or from legal practice in another state. The New Jersey Supreme Court approved the New Jersey Institute for Continuing Legal Education ("ICLE") to administer this course.

In January 1987, the New Jersey Supreme Court directed ICLE to enforce a mandatory attendance policy for all registrants of the skills and methods course (the "mandatory attendance requirement"). ICLE implemented this directive after an extensive evaluation that included public notice of the proposal. ICLE currently offers the skills and methods course in four cycles throughout the year in three different scheduling formats. Newly admitted attorneys are free to choose the most convenient course cycle and format. The first year requirement for the course requires an attorney to attend 40 hours of lectures.

Attendance is mandatory in all cycles and formats. Rule 1:26 provides that "failure to complete the course successfully shall render an attorney ineligible to practice law."

II.

Appellant Robert Tolchin is a resident of New York State. He graduated from Cardozo Law School in 1992, sat for and passed the New Jersey Bar Exam in July, 1992, and was sworn in to the New Jersey bar in December, 1992. Tolchin contacted ICLE and asked whether he could satisfy the skills and methods course requirement through equivalent courses offered in New York or through home study materials. ICLE informed him that he must physically attend the courses in New Jersey. Tolchin has not attended the courses, nor does he maintain an office in New Jersey. As a consequence, Tolchin has not satisfied the conditions necessary to practice law in New Jersey, even though he has been sworn in to the New Jersey bar.

Tolchin filed suit on October 12, 1994, pursuant to 42 U.S.C. §§ 1983 and 1985. The suit raises a myriad of constitutional challenges to the bona fide office and the mandatory attendance requirements. Specifically, Tolchin argues that the bona fide office and the mandatory attendance requirements violate the Commerce Clause, the Privileges and Immunities Clause of Article IV, section 2, and the Equal Protection Clause of the Fourteenth

Amendment to the Constitution. He also argues that the implementation and teaching of the skills and methods course violate the Due Process Clause of the Fourteenth Amendment to the Constitution.[1] Tolchin named as defendants (1) the Supreme Court of New Jersey; (2) Chief Justice Robert N. Wilentz;[2] (3) the Clerk of the Supreme Court of New Jersey, Stephen W. Townsend; (4) the New Jersey Board of Bar Examiners; (5) the Board's Secretary, Samuel J. Uberman; (6) ICLE; and (7) Skills and Methods Course Director Joseph J. Hogya (collectively the "Appellees").

The Appellees filed a motion for summary judgment. The district court referred the case to a magistrate judge. The magistrate judge filed a Report and Recommendation which recommended that summary judgment be granted. The district court adopted the report and recommendation and entered summary judgment in favor of the Appellees. Tolchin then filed this appeal. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291.

As this is an appeal from the district court's Order granting summary judgment to Appellees, we conduct a *de novo* review. *Pennsylvania Coal Ass'n* v. *Babbitt*, 63 F.3d

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[1] Tolchin also argues that ICLE's application for summary judgment under the Eleventh Amendment should be denied; the individual defendants are proper parties; and summary judgment should be granted in his favor. Because of our disposition of the merits, we need not consider these issues.

[2] Chief Justice Wilentz resigned on July 1, 1996. He has been succeeded as Chief Justice by Deborah T. Poritz.

231, 236 (3d Cir. 1995). We must apply the same test used by the district court; namely, whether there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Hersh v. Allen Products Co.*, 789 F.2d 230, 232 (3d Cir. 1986). In determining whether to grant a motion for summary judgment, we must draw all reasonable inferences in favor of Tolchin, as the non-moving party. *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983).

III.

A.

Tolchin's Commerce Clause Challenge

Tolchin argues that the district court erroneously dismissed his Commerce Clause challenge to the bona fide office and the mandatory attendance requirements. He states that "the defendants have implemented regulations that unconstitutionally impair interstate commerce without sufficient justification and have thus violated the 'dormant' facet of the Commerce Clause." Tolchin Br. at 16.

The United States Constitution provides that "Congress shall have Power . . . to regulate Commerce . . . among the several States." U.S. Const. art. I, § 8. While the Commerce Clause explicitly speaks only to the power of Congress to regulate interstate commerce, it has been interpreted to contain "an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce." *Western & Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 652 (1981). This implied limitation is sometimes referred to as the 'negative' or 'dormant' Commerce Clause, and it is this aspect of Commerce Clause jurisprudence that is at issue in this case.

The dormant aspect of the Commerce Clause "prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988). State legislative enactments, executive regulations and judiciary-approved rules can all be subject to Commerce Clause analysis. *See e.g., New Energy*, 486 U.S. 269 (statute); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (executive order); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (judiciary-approved rule).

When conducting a dormant Commerce Clause analysis, we seek to balance the national interest in vibrant interstate commerce with the local interests

promoted by the state regulation. In *Pike*, the Supreme Court stated that

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld *unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits*. . . . If a legitimate local purpose is found, then the question becomes one of degree.

397 U.S. at 142 (citation omitted) (emphasis added).

In *Brown-Forman Distillers Corp. v. New York Liquor Authority*, 476 U.S. 573 (1986), the Supreme Court later refined its Commerce Clause analysis by holding that when a state statute "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," it may generally be struck down without further inquiry. 476 U.S. at 578-79; *see also Institutional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 824 (3d Cir. 1994). On the other hand, when a statute only indirectly affects interstate commerce and regulates evenhandedly, a determination must be made as to whether the State's interest is "legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman*, 476 U.S. at 579 (citing *Pike*, 397 U.S. at 142). In both cases, however, "the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.*

In this case, the district court, adopting in full the

Magistrate's Report and Recommendation, applied the second — the "balancing rule" — standard, which it formulated as follows:

> if legislation is *facially neutral*, and only has an incidental effect on commerce, the legislation will be upheld unless the burden on commerce is "clearly excessive in relation to the putative local benefits."

Report and Recommendation of Magistrate Judge at 21 ("Magistrate Report") (emphasis added) (quoting *Pike*, 397 U.S. at 142) (adopted by district court in *Tolchin v. Supreme Court of the State of New Jersey*, No. 94-4860 (D.N.J. Dec. 14, 1995)).

Although we agree with the district court's selection of the balancing rule test and its result, we disagree with its articulation of the test. For the balancing rule test to apply, a state's action must not be merely 'facially neutral,' but must also be neutral in effect. *Brown-Forman* makes clear that heightened scrutiny applies not only when legislation is facially discriminatory, but also when a state statute or regulation's "effect is to favor in-state economic interests over out-of-state interests. . . ." 476 U.S. at 579.

2.

Tolchin argues that the bona fide office and mandatory attendance requirements favor in-state economic interests and amount to "economic

protectionism" that must be subject to the Commerce Clause's heightened scrutiny standard of review. Just as a law forbidding sleeping under a bridge falls more heavily on the shoulders of the indigent than on those of the wealthy, Tolchin argues, these requirements fall more heavily on the shoulders of nonresidents than on those of residents.

This analogy sheds little light on the issue before us. Most laws and regulations affect different people differently, depending on their circumstances. The relevant question here is whether there is any differential treatment of nonresident attorneys that "favors in-state interests over out-of-state interests" and "the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman,* 476 U.S. at 579.

All parties agree that, on its face, New Jersey's bona fide office requirement does not discriminate against out-of-state attorneys. *See* N.J.Ct.R. 1:21-1(a). However, Tolchin maintains that the bona fide office requirement effectively favors resident attorneys. We disagree. All attorneys who wish to practice in New Jersey must have a bona fide office. As one commentator has observed, the requirement's intent was to prevent occasional practice in New Jersey by an attorney once admitted, but who now practices primarily in another state. Pressler, Current New Jersey Court Rules, Comment R. 1:21-1. Such an attorney could lose his or her familiarity with New Jersey law and its development. *Id.* Thus, it is reasonable to

assume that the only attorneys actually burdened by this requirement are those who wish to maintain a small or sporadic practice in New Jersey. Tolchin argues that although such attorneys are required to spend the money necessary to maintain a bona fide office, they will not receive the comparable benefits that most attorneys with larger New Jersey practices would enjoy. While Tolchin might be right, his argument fails to implicate the Commerce Clause because such attorneys may be New Jersey residents as well as nonresidents.

Tolchin has also argued that it is less expensive for New Jersey residents to have a bona fide office because they can maintain one in their homes. Yet, a bona fide office is more than a mere address — it is a functioning office. Tolchin has not shown that more than a few attorneys practice from their homes, so that any advantage which inures to resident attorneys in this regard is minimal. All attorneys must incur some expense in order to comply with this requirement. Any incidental discrimination caused by the bona fide office requirement is not based on residency status, but on the size and type of an attorney's practice.

We reach the same conclusion with respect to New Jersey's mandatory attendance requirement, which does not discriminate on its face nor in effect against out-of-state interests any more than the bona fide office requirement. It, too, applies equally on its face to residents and nonresidents and does not effectively favor resident attorneys. Rather, any burden it imposes is directly

proportional to the distance an attorney must travel to a skills and methods course site. Tolchin implicitly acknowledges that he is no more personally burdened by this requirement than many New Jersey attorneys, as he repeatedly notes how close New York is to New Jersey. While it is true that the mandatory attendance requirement may present difficulties for those residing hundreds or thousands of miles from New Jersey, we believe it is safe to assume that few attorneys live that far from where they intend to practice. *See Frazier v. Heebe*, 482 U.S. 641, 648-49 (1987) ("As a practical matter, a high percentage of nonresident attorneys willing to take the state bar examination and pay the annual dues will reside in places 'reasonably convenient' to the" court.); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 286-87 (1985) ("One may assume that a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues will reside in places reasonably convenient to New Hampshire."). We do not believe that the mandatory attendance requirement was purposefully intended to discriminate against the putative class of attorneys who intend to practice a great distance from New Jersey. It is safe to assume that most of the attorneys affected by this regulation are residents of New Jersey, New York and Pennsylvania.

We conclude that neither the bona fide office nor the mandatory attendance requirement – purposefully or arbitrarily discriminate against out-of-state interests.

Because the bona fide office and the mandatory attendance requirements do not directly regulate or discriminate against interstate commerce, the heightened scrutiny test is not applicable. *See Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 824 (3d Cir. 1994). Thus, this case is distinguishable from the Commerce Clause cases that have applied heightened scrutiny to waste flow control ordinances. The Supreme Court has found that flow control ordinances have the effect of depriving "competitors, including out-of-state firms, of access to a local market. . . ." *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1679 (1994); *see also Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir. 1995). Because we have found no such deprivation, those cases do not mandate that we apply heightened scrutiny here. Accordingly, the district court was correct in applying the balancing rule test. Under this test, we must compare the local benefits of a regulation with the incidental burdens that it imposes on interstate commerce in order to determine whether the burdens are clearly excessive. *Id.*

Appellee New Jersey Supreme Court argues that the bona fide office requirement has the benefits of assuring the competence, accountability and accessibility of attorneys for the benefit of clients, courts, counsel and parties. Tolchin responds that there is no rational relationship between these benefits and the bona fide office

requirement. While we agree with Tolchin's analysis in part, we nonetheless find that a rational relationship exists between the benefit of attorney accessibility and the bona fide office requirement.

In a case where in-state offices were required only of nonresidents, the United States Supreme Court held that there is no rational relationship between such a requirement and attorney competence. *Frazier v. Heebe,* 482 U.S. 641, 649 (1987) ("the mere fact that an attorney has an office in [a jurisdiction] surely does not warrant the assumption that he or she is more competent than an out-of-state member of the state bar."); *see also Barnard v. Thorstenn,* 489 U.S. 546, 555 (1989) ("We can assume that a lawyer who anticipates sufficient practice in[a jurisdiction] to justify taking the bar examination and paying the annual dues . . . will inform himself of the laws of the [jurisdiction]."); *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 285 (1985) (Court will not assume that "a nonresident lawyer — any more than a resident — would disserve his clients by failing to familiarize himself with the [local law]."). We believe that this holds true for the facts presented in this case as well. The Appellees have put forth no credible arguments as to why the bona fide office requirement would make an attorney more competent.

Nor do we find that New Jersey's bona fide office requirement increases attorney accountability. New Jersey requires that all nonresident attorneys designate the Clerk of the New Jersey Supreme Court as agent for

receipt of service of process. N.J.Ct.R. 1:21-1(a). The New Jersey Supreme Court can therefore discipline all members of the New Jersey bar, regardless of residency. The Appellees make no compelling argument as to how New Jersey's bona fide office requirement is rationally related to attorney accountability.

However, we do believe that the bona fide office requirement has a rational relationship to the benefit of attorney accessibility for clients, courts, counsel and parties, and our belief is borne out by a New Jersey case which highlights the problems caused by attorneys who fail to maintain bona fide offices in New Jersey. In *In The Matter of Kasson*, 141 N.J. 83 660 A.2d 1187 (1995), the New Jersey Supreme Court upheld the disciplining of an attorney pursuant to Rule 1:21-1(a) because the trial court had serious difficulty locating him during the course of litigation. *Kasson*'s New Jersey office was never used, his name was misspelled on a sign and the office number on his letterhead was not the same as the number on the sign, which was not the same as the number of the actual office. *Id. See also* Opinion 19, above, pp. 11-12 (disciplining a bar member for renting, but not using, office in New Jersey). In our view, this case demonstrates that there is satisfactory basis to find a rational relationship between the bona fide office requirement and the intended benefit of attorney accessibility.[3]

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[3] Chief Judge Sloviter agrees that the bona fide office requirement has a rational relationship to the benefit of attorney accessibility for clients, courts, counsel and parties. Inasmuch as the

(continued next page)

Thus, while the bona fide office requirement does impose the burden of maintaining an office on some attorneys who would prefer not to maintain one, we believe that those most burdened do not constitute a very large class. This class may include those who practice solely, but sporadically, in New Jersey; those who occasionally practice in New Jersey as part of a larger practice based in another state; and those who prefer to practice without maintaining any office at all. The requirement's burden affects interstate commerce in that it limits the mobility of some lawyers and reduces the options for consumers of the services they provide.

However, under the balancing test, we find that the burden on interstate commerce does not *clearly* outweigh the benefit received from the bona fide office requirement. *See Instructional Sys.*, 35 F.3d at 824. This is not to say that such a requirement is the most narrowly tailored solution to the problem of attorney accessibility. We merely hold that such a requirement is rationally related to the benefit it is supposed to ensure.[4]

Likewise, we believe that the mandatory attendance

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challenged rule can be sustained on that basis, she does not join the portion of this opinion that rejects the New Jersey Supreme Court's argument that the bona fide office requirement helps assure the competence and accountability of attorneys.

[4] We also note that the United States Supreme Court, in dicta, has approved just such a requirement. *Supreme Court of Virginia* v. *Friedman*, 487 U.S. 59, 69-70 (1988) (Virginia "requires that attorneys admitted on motion maintain an office for the practice of law in Virginia . . . . The office requirement furnishes an alternative to the residency requirement. . . .").

requirement for the skills and methods course is rationally related to the benefits it is intended to promote. The skills and methods classes are intended to train attorneys new to the New Jersey bar and to protect the public from untrained attorneys. Mandatory attendance at the course serves a defensible educational purpose: it ensures that attorneys hear — if not listen to — those topics thought to be important by the Appellees.

In support of his argument to the contrary, Tolchin submitted an affidavit from Dean Frank Macchiarola of the Cardozo Law School which, Tolchin argues, indicated that mandatory attendance served no valid educational function. However, the Macchiarola affidavit does not make such sweeping claims. It is limited to disputing some of the reasons proffered by Hogya for the mandatory attendance requirement; to asserting that mandatory attendance has no advantage over other approaches; and to extolling the advantages of customized learning. As a result, this affidavit fails to raise a genuine issue of material fact as to whether the mandatory attendance requirement is rationally connected to its intended benefits.

Moreover, the burdens on interstate commerce imposed by the mandatory attendance requirement for the skills and methods course are relatively small when compared to the benefits it promotes. The first year component of the course requires an attorney to invest a total of 40 hours. For that investment, New Jersey can be confident that attorneys new to its bar are at least

minimally familiar with its laws. This requirement is even a small burden for those attorneys who want to practice in more than one state. Finally, the commuting burden for Tolchin, who is a bridge or two away from New Jersey, is actually less than it is for many New Jersey residents. *See id.*

Because this requirement appears to be a substantial burden only for the relatively few nonresident attorneys who reside a great distance from New Jersey, we do not find that such a burden clearly outweighs the benefits promoted by this requirement. Nor has Tolchin demonstrated that this widely accepted educational policy is in some way so wrong that we must declare it irrational.[5]

Even if the New Jersey rules were to have an element of "economic protectionism," we do not find that the requirements at issue in this case are so protectionist as to fail in the context of a dormant Commerce Clause analysis. Thus, we conclude that the district court

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[5] We note that the Supreme Court, in dicta, has approved of mandatory attendance requirements for continuing legal education. *See Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 69 (1988) (court can "require mandatory attendance at periodic Continuing Legal Education courses."); *Frazier v. Heebe*, 482 U.S. 641, 648, (1987) ("[O]ther more effective means of ensuring the competence of bar members are available . . . including examination or seminar attendance requirements."); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 n.19 (1985) ("A less restrictive alternative would be to require mandatory attendance at periodic seminars on state practice. There already is a rule requiring all new admittees to complete a 'practical skills course' within one year of their admission.").

properly relied upon the *Pike* balancing test, and concur with its result. New Jersey's bona fide office and mandatory attendance requirements generally burden nonresident attorneys to the same degree that they burden resident attorneys. The fact that these requirements may burden commerce in some incidental way is not enough to support Tolchin's claim.

Moreover, states clearly have a substantial interest in assuring the availability of and overseeing attorneys practicing within their borders. *See Leis v. Flynt*, 439 U.S. 438, 444 n.5 (1978) (recognizing "the traditional authority of state courts to control who may be admitted to practice" before them); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (recognizing state courts have "broad power to establish standards for licensing practitioners and regulating the practice of professionals"). And finally, where heightened scrutiny is not warranted, we must not "second-guess the empirical judgment of lawmakers concerning the utility of legislation." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987) (quoting *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679 (1981) (Brennan, J., concurring)).

Tolchin argues that, at the very least, summary judgment should be denied so as to allow further investigation of the burdens of these requirements. We find that further investigation is unnecessary because, as the Fourth Circuit noted in a similar context, to require hearings in such cases

> would deal a serious blow to the capacities of

> the states and localities to further even the most basic regulatory purposes. As the Commerce Clause is implicated by almost every economic regulation . . . and its shadow extends equally far . . . such hearings would be an almost constant process.

Goldfarb v. *Supreme Court of Virginia*, 766 F.2d 859, 862 (4th Cir. 1985). We agree.

B.

Tolchin's Privileges and Immunities Challenge

Tolchin further claims that the bona fide office and mandatory attendance requirements violate the Privileges and Immunities Clause.

The Privileges and Immunities Clause provides that "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. This clause was intended to "fuse into one Nation a collection of independent, sovereign States." *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 279 (1985) (quoting *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948)). Under this clause, the terms "citizen" and "resident" are used interchangeably. *Piper*, 470 U.S. at 279 n.6.

The Privileges and Immunities Clause applies only "with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity." *Id.* at 279 (quoting *Baldwin* v. *Montana Fish & Game*

Commission, 436 U.S. 371, 383 (1978)). The United States Supreme Court has found that "one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Piper*, 470 U.S. at 280 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). The Supreme Court has recognized the practice of law as a privilege under the Privileges and Immunities Clause, "and that a nonresident who passes a state bar examination and otherwise qualifies for practice has an interest protected by the Clause." *Barnard v. Thorstenn*, 489 U.S. 546, 553 (1989); *see also Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 65 (1988); *Piper*, 470 U.S. at 279-83. The practice of law is protected by the Privileges and Immunities Clause because it plays a vital role in the nation's economy and facilitates the vindication of individual and societal rights. *Piper*, 470 U.S. at 280-81.

If a state statute or regulation imposes identical requirements on residents and nonresidents alike and it has no discriminatory effect on nonresidents, it does not violate the Privileges and Immunities Clause. *Lutz v. City of York, Pennsylvania*, 899 F.2d 255, 263 (3d Cir. 1990). But when a challenged restriction deprives nonresidents of a privilege or immunity protected by this clause, it is invalid unless "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Piper*, 470 U.S. at 284. In addressing these questions, we consider, among other things, whether less restrictive means of regulation

are available. *Barnard*, 498 U.S. at 552-53. Of course, we must distinguish between incidental discrimination against nonresidents and discrimination that imposes too heavy a burden on their privileges. *See id.* at 557.

Over the last ten years, the United States Supreme Court has considered whether a number of bar admission requirements violate the Privileges and Immunities Clause. In 1985, the Court struck down a New Hampshire residency requirement, which limited state bar admission to New Hampshire residents, as a violation of the Privileges and Immunities Clause. *Piper*, 470 U.S. at 288. The Court determined that the residency requirement deprived nonresidents of a protected privilege. *Id.* at 284.

New Hampshire defended its rule, contending that nonresident bar members would be less likely to stay current with local rules and procedures, to behave ethically, to do pro bono work in the state and to be accessible to clients and the court. *Id.* at 285. The Court disagreed with each of these contentions, stating that a nonresident attorney's interest in his or her reputation would provide the same incentive to maintain high standards as would that of a resident attorney. *Id.* at 286. The Court found that New Hampshire had not shown a "substantial reason" for discriminating against nonresident bar applicants and had not demonstrated that the discrimination bore a close relationship to its objectives. *Id.* at 287. The Court concluded that less restrictive alternatives — including mandatory attendance at seminars on state practice — would support the State's

interest in ensuring that admitted attorneys were familiar with local rules and procedure. *Id.* at 284-87.

Similarly, in *Friedman*, the Supreme Court struck down a Virginia rule that permitted admission to the Virginia bar simply on motion for attorneys who had become permanent residents of Virginia and were licensed in another state. *Friedman*, 487 U.S. at 61. Nonresidents of Virginia admitted to practice in another state, however, were required to take the Virginia bar exam. The Supreme Court determined that Virginia's discretionary admissions policy violated the Privileges and Immunities Clause by denying nonresident attorneys the opportunity to practice law in Virginia on terms substantially equal to those of resident attorneys. *Id.* at 70. In so holding, the Court specifically noted that Virginia's requirement that attorneys maintain in-state offices furnished a less restrictive alternative to protect its regulatory interests. *Id.*

More recently, in *Barnard v. Thorstenn*, 489 U.S. 546 (1989), the Supreme Court struck down a residency requirement incorporated into a District Court of the Virgin Islands Rule. This rule provided that before an otherwise qualified attorney could be admitted, that attorney must establish that he or she resides and intends to continue residing in the Virgin Islands. *Id.* at 559. The Supreme Court held that this residency requirement violated the Privileges and Immunities Clause by excluding nonresidents from the Virgin Islands bar. *Id.* Moreover, the Court determined that the residency

requirement did not bear a substantial relation to the District Court of the Virgin Islands' objectives, which included ensuring the availability of nonresident attorneys and maintaining an adequate level of competence in the local laws, which were infrequently published. *Id.* at 558-59.

The Court found that less restrictive means existed to address these concerns. Nonresidents could associate with local counsel, relieving the State of any burden associated with accommodating nonresidents' travel schedules. *Id.* at 555. The Court also found that if the Virgin Islands failed to publish legal materials in a timely manner, the problem of attorneys staying current with local law would be just as severe for residents as nonresidents. *Id.* at 556.

Since 1985, then, the United States Supreme Court has struck down restrictions on state bar admission requirements, and has indicated that a state must treat residents and nonresidents equally when it considers an individual's admission to the bar. As a result of these decisions, all states have eliminated residency-based bar admission requirements.[6] A state's interest in regulating the practice of law is similar to its interest in regulating admission to the bar, and the Supreme Court cases in this area offer us guidance in our analysis.

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[6] *See* Brian N. Corrigan et al., *Admission?, Yes; Practice? No: New York Inconsistent Treatment of Nonresident Attorneys*, 6 St. John's J. Legal Comment. 383, 390 (1991).

Our Privileges and Immunities analysis has two steps. First, do the bona fide office and mandatory attendance requirements discriminate against nonresident attorneys? Second, if they do, is the imposition too heavy a burden on the privileges of nonresidents, and does it fail to bear a substantial relationship to New Jersey's objective? *See Barnard v. Thorstenn*, 489 U.S. 546, 557 (1989).

As noted in Section III. A., above, both requirements similarly affect residents and nonresidents. Resident and nonresident attorneys alike must maintain a New Jersey office. Moreover, as the district court noted, the bona fide office requirement provides New Jersey with a reasonable avenue through which it can protect its interest of ensuring that attorneys licensed in New Jersey are available to New Jersey courts, practitioners and clients. *See Friedman*, 487 U.S. at 69-70 (recognizing that an in-state office requirement was an appropriate and less restrictive means of enforcing Virginia's full time practice restriction).

Similarly, the mandatory attendance requirement applies equally to residents and nonresidents. Tolchin argues that the mandatory attendance policy is discriminatory because it unduly burdens nonresident attorneys who may not be able to find time to attend the skills and methods class. However, as we have already noted, a New Jersey resident may need to travel farther and longer than someone in New York City to get to a course site. In other words, the discrimination here is

based on the inconvenience of course sites and not on residence status. Nonresidents who wish to practice law in New Jersey are required to make the effort to attend continuing education courses. This is a rational requirement, given the need to educate attorneys new to the New Jersey bar and given traditional educational approaches.[7]

We conclude that the bona fide office and mandatory attendance requirement do not impose a disproportionately heavy burden on nonresidents. These requirements bear a substantial relationship to New Jersey's goal of regulating the practice of law to the benefit of the public and are not overly restrictive of attorneys. Thus, these requirements do not violate the Privileges and Immunities Clause. *See Barnard v. Thorstenn*, 489 U.S. at 557.

C.

Tolchin's Equal Protection Clause Challenge

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The threshold question is what standard governs the equal protection analysis in this case.

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[7] Moreover, as we noted above, the United States Supreme Court has indicated in dicta that such a requirement was consistent with the Privileges and Immunities Clause. *Friedman*, 487 U.S. at 69;

(continued next page)

Tolchin argues that the right to practice law in New Jersey is a fundamental right for equal protection purposes. Thus, Tolchin claims, the district court erred in granting summary judgment to the Appellees on his equal protection challenge because it did not apply the strict scrutiny standard of review to the bona fide office and the mandatory attendance requirements. In the alternative he argues that these requirements would not even survive rational basis review.

We have found that as a general matter, "economic and social legislation is subject to rational basis review, under which a law need only be 'rationally related to a legitimate state interest.'" *Schumacher* v. *Nix*, 965 F.2d 1262, 1266 (3d Cir. 1992) (quoting *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (per curiam)). However, where legislation establishes a classification that implicates fundamental rights or draws upon suspect distinctions such as race, religion or alienage, the legislation must meet strict scrutiny analysis. *Schumacher*, 965 F.2d at 1266. While we are not reviewing legislation in the traditional sense, judiciary-approved rules fall within the ambit of the Equal Protection Clause. *Id.* at 1266 n.6.

The Supreme Court has indicated that the right to practice law is not a fundamental right for the purposes of the Fourteenth Amendment. *See Leis* v. *Flynt*, 439 U.S. 438, 442 n.5 (1979) ("[T]he suggestion that the

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Piper, 470 U.S. at 285 n.19; *see* n.5 above.

Constitution assures the right of a lawyer to practice in the court of every State is a novel one, not supported by any authority brought to our attention."); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957) ("[A] State can require high standards of qualification . . . before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."). Moreover, we have flatly rejected the argument that the practice of law is a fundamental right protected by the Equal Protection Clause. *Edelstein v. Wilentz*, 812 F.2d 128, 132 (3d Cir. 1987); *In the Matter of Roberts*, 682 F.2d 105, 108 (3d Cir. 1982).

Tolchin claims that *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), supports his position. In *Piper*, the Court determined that the "the opportunity to practice law should be considered a 'fundamental right'" which "falls within the ambit of the Privileges and Immunities Clause." *Id.* at 281. Tolchin attempts to bootstrap this use of the term "fundamental right" into equal protection jurisprudence. However, "fundamental" privileges and immunities are not interchangeable with the rights deemed "fundamental" for equal protection purposes. *See Friedman v. Supreme Court of Virginia*, 822 F.2d 423, 426 (4th Cir. 1987), *aff'd*, 487 U.S. 59 (1988) (recognizing that "the Privileges and Immunities Clause protects more [rights] than those rights which are considered fundamental individual rights protected by the Fourteenth Amendment").

The bona fide office and mandatory attendance requirements apply to all attorneys who want to practice in New Jersey. They do not create a suspect classification based on race, religion or alienage. Accordingly, there is simply no basis upon which Tolchin can credibly argue that strict scrutiny is the appropriate standard of review. *See Schumacher*, 965 F.2d at 1266. We conclude that Tolchin's claim that the bona fide office and mandatory attendance requirements deny him the right to practice law is subject to a rational basis review.

Tolchin argues that even if heightened scrutiny is unwarranted, the bona fide office and the mandatory attendance requirements fail to survive rational basis review. He claims that these requirements are not rationally related to New Jersey's interest in regulating the practice of law. To demonstrate the alleged irrationality of the requirements, Tolchin suggests a number of alternatives, less burdensome to him, that the New Jersey Supreme Court could implement to achieve its objectives. We need not consider these alternatives. For the purposes of rational basis review, we have held that a rule need not be the least restrictive means of achieving a permissible end. *Id.* So long as the New Jersey Supreme Court "could rationally have decided" that its action would further its goal, "the Equal Protection Clause is satisfied." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981); *see also Parham v. Hughes*, 441 U.S. 347, 351 (1979) ("Under a rational basis test, a law is entitled to a presumption of validity.").

Both the bona fide office and mandatory attendance requirements are rationally related to New Jersey's interest in regulating the practice of law. We have already concluded that the bona fide office requirement is rationally related to New Jersey's interest in ensuring that attorneys admitted to practice law in New Jersey are available to New Jersey courts. *See* Section III. A., above. The fact that Tolchin and others similarly situated may be burdened by this requirement is not enough to deem the requirement invalid under the rational relation test. *See Schumacher*, 965 F.2d at 1266. The skills and methods course was developed to assist attorneys in their transition to practice in New Jersey from law school or practice in another state. The mandatory attendance requirement, by ensuring that attorneys be, at a minimum, present at the Continuing Legal Education classes, will tend to ensure that attorneys absorb the lessons of the course. While Tolchin may be correct in maintaining that he could just as easily learn the material from the comfort of his own home, rational basis review does not allow us to conclude that New Jersey was constitutionally required to accommodate him. *See Clover Leaf Creamery Co.*, 449 U.S. at 466.

In summary, the right to practice law is not a fundamental right for the purposes of the Equal Protection Clause. Thus, Tolchin's claim fails because the bona fide office and mandatory attendance requirements are rationally related to New Jersey's legitimate interests in regulating the practice of law within its borders.

D.

Tolchin's Due Process Challenge

Rule 1:26 provides that the skills and methods "course format shall be set forth in the rules of the Board of Bar Examiners." N.J.Ct.R. 1:26. The Board has not promulgated any rules regarding the skills and methods course. Tolchin argues that the implementation of the skills and methods course violate [sic] the Due Process Clause of the Fourteenth Amendment to the Constitution because the New Jersey Board of Bar Examiners failed to adopt the rules governing the format and curriculum of the course through formal rulemaking procedures, thereby depriving him of his right to earn his livelihood by practicing in New Jersey.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty or property without due process of law."[8] U.S. Const. amend. XIV. To satisfy the requirements of the Due Process Clause, laws and regulations must provide specific standards which avoid arbitrary and discriminatory enforcement. *Grayned v. Rockford*, 408 U.S. 104, 109 (1972). An agency's failure to follow its rules and regulations, however, is not a per se violation of due process. *See United States v. Caceres*, 440 U.S. 741 (1979). Rather, the Due Process Clause is

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[8] Because of the result that we reach in this case, we need not decide the related question of whether one who has passed a state bar exam, but who is for some reason ineligible to practice, has a property interest protected by the Due Process Clause.

implicated only when an agency violates regulations mandated by the Constitution or by law; or when "an individual has reasonably relied on an agency regulations [sic] promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency." *Id.* at 752-53. Due process may also be violated if the government acts arbitrarily or capriciously. *Grayned,* 408 U.S. at 109.

Rule 1:26 is not mandated by the Constitution or by law. Rather, it is a rule promulgated by the New Jersey Supreme Court for the oversight of the New Jersey bar. Furthermore, Tolchin has not made any showing that he has reasonably relied on Rule 1:26 to his detriment.

Rather, the record indicates that Tolchin was unaware of what was required to practice in New Jersey. The New Jersey Supreme Court has approved specific standards which guide the administration of the skills and methods course. *See* Magistrate Report at 14-16. That court specifically directed ICLE to implement a mandatory attendance policy. This directive was only implemented after public notice of the proposal. The record indicates that the Appellees have in all ways — except for promulgating the Board of Law Examiners Rules — acted with forethought and consistency in regard to the skills and methods course. Thus, Tolchin has suffered no violation of due process. *See Grayned*, 408 U.S. at 109.

Tolchin has not been excluded from the practice of law. To the contrary, he has unilaterally decided that the mandatory attendance requirement is too burdensome for

him. As a result, he is unable to satisfy New Jersey's skills and methods course requirement, rendering him ineligible to practice there. Clearly, then, Tolchin's inability to practice law is due to his own actions and not to any constitutional due process violation.

IV.

In conclusion, Tolchin has not raised an issue of fact sufficient to precluded the entry of summary judgment in favor of the Appellees. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

While it may be true, as Tolchin argues, that the bona fide office requirement may include an element of economic protectionism, such is not fatal to a state statute or regulation. *See Piper*, 470 U.S. 274, 285 n.18 (1985).

Tolchin may also be right in noting the peculiarities present in this case: these rules were promulgated by members of the New Jersey bar to regulate members of the New Jersey bar. To be sure, there are few checks and balances — aside from seeking redress in the federal courts — to ensure that such rules are not designed primarily for the benefit of the New Jersey bar. However, we are satisfied that the requirements at issue in this case withstand Tolchin's challenge. We continue to believe that states should have latitude "in regulating the practicing of law and admission to the bar." *Schumacher v. Nix*, 965 F.2d 1262, 1269 (3d Cir. 1992).

We recognize that one could argue that some of the recent rapid advances in communication and transportation technology may render the bona fide office requirement's intended benefit of attorney accessibility less significant in the future. *See Piper*, 470 U.S. at 287 n.21 ("Conference calls are being used increasingly as an expeditious means of dispatching pretrial matters."); *Frazier*, 482 U.S. at 649 ("[M]odern communication systems, including conference telephone arrangements, make it possible to minimize the problem of unavailability."). Notwithstanding this concern, and for the reasons mentioned above, we will affirm the district court's grant of summary judgment to the defendants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Order of District Judge William G. Bassler, United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

ROBERT J. TOLCHIN, Plaintiff,	)	Civ. No. 94-4860 (WGB)
v.	)	
THE SUPREME COURT OF THE STATE OF NEW JERSEY, et. al., Defendants.	)	ORDER

This matter having come before the Court on the defendants' motion for summary judgment; and

The Court having referred the matter to the Honorable Dennis M. Cavanaugh, U.S.M.J., for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) & (C), Fed. R. Civ. P. 72, and Local Rule 40A.2; and

Plaintiff Robert J. Tolchin having filed objections to the Report and Recommendation under Fed. R. Civ. P. 72(b) and Local Rule 40D.5; and

The Court having conducted a de novo review; and

The Court having considered the written submissions of the parties; and

The Court having found the objections to be without merit; and

For good cause shown;

It is on this 14th day of December, 1995 ORDERED that the Report and Recommendation of United States Magistrate Judge Dennis M. Cavanaugh, filed on August 29, 1995 , is hereby **ADOPTED** as the findings of fact and conclusions of law of this Court; and

It is FURTHER ORDERED that defendants' motion for summary judgment is GRANTED; and

It is FURTHER ORDERED that the Complaint is DISMISSED.

/S/

WILLIAM G. BASSLER, U.S.D.J.

Report And Recommendation of Magistrate Judge Cavanaugh, Untied States District Court For The District Of New Jersey

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

ROBERT J. TOLCHIN, Plaintiff,	)	Hon. William G. Bassler
v.	)	Civ. No. 94-4860 (WGB)
THE SUPREME COURT OF THE STATE OF NEW JERSEY, et. al., Defendants.	)	REPORT & RECOMMENDATION

DENNIS M. CAVANAUGH, U.S. Magistrate Judge:

This matter comes before the Court upon motions by Defendants for summary judgment, pursuant to Fed.R.Civ.P. 56. These motions were referred to the undersigned for the within Report and Recommendation by the Honorable William G. Bassler, pursuant to 28 U.S.C § 636(b)(1)(B) and (C), Fed.R.Civ.P. 72, and New Jersey Local Rule 40A.2. Oral argument was heard on June

12, 1995. For the reasons discussed below, the Court recommends that Defendants' motions for summary judgment be granted and Plaintiff's complaint be dismissed.

BACKGROUND

Plaintiff, Robert J. Tolchin ("Tolchin"), is a resident of Scarsdale, New York. Tolchin graduated from Cardozo Law School in 1992. He sat for and passed the New Jersey Bar Exam in July, 1992, and was sworn in to the New Jersey Bar in December 1992.

As a newly admitted attorney, Tolchin was required to complete a skills and methods course on New Jersey practice, approved by the New Jersey Supreme Court as a condition to maintaining his New Jersey license. N.J.Ct.R. 1:21-1(a); N.J.Ct.R. 1:26. The skills and methods course is intended to prepare attorneys for the transition from either law school to legal practice in New Jersey, or from legal practice in another state to legal practice in New Jersey. See ICLE Rule 12G Statement, ¶ 11. The skills and methods course is also intended to familiarize and teach attorneys local nuances of practice and procedure in New Jersey. Id. The New Jersey Institute for Continuing Legal Education ("ICLE") administers the skills and methods course on behalf of the New Jersey Supreme Court. Affidavit of Stephen W. Townsend, ¶ 5 ("Townsend Aff."); see also Affidavit of Joseph J. Hogya, ¶ 7 ("Hogya Aff."). ICLE is the only

organization which has ever administered the skills and methods course. Id.

Beginning January 1, 1987, the New Jersey Supreme Court directed ICLE to enforce a mandatory attendance policy for all registrants of the skills and methods course, irrespective of residence. Hogya Aff. ¶¶ 3-4. The mandatory attendance policy was imposed at the direction and approval of the Supreme Court of New Jersey upon the recommendations of the Supreme Court's Advisory Committee on Bar Admissions and proposals of an ad hoc working group. Townsend Aff. ¶¶ 3-4. Among others, the Advisory Committee on Admissions was comprised of the entire membership of the Board of Bar Examiners. See N.J.Ct.R. 1:27A-2. The mandatory attendance policy was implemented after public notice of the proposed amendment. Townsend Aff. ¶ 4.

Presently, ICLE offers the skills and methods course in four cycles throughout the year in three different scheduling formats. Newly admitted attorneys are free to choose the course cycle and format which is most convenient for them. Regardless of which cycle or format a newly admitted attorney chooses, attendance is mandatory.

In the case at bar, Plaintiff corresponded with ICLE and inquired as to whether he could satisfy the New Jersey continuing education requirements through equivalent courses offered in New York or through home study materials. Affidavit of Robert J. Tolchin, Esq., ¶ 10 ("Tolchin Aff."); Hogya Aff., ¶ 6. Plaintiff was advised that

in order to satisfy the New Jersey continuing education requirements he must physically attend the courses in New Jersey. Id.

Plaintiff initiated the present action to challenge the constitutionality of the mandatory attendance requirement. Tolchin alleges that the mandatory attendance requirement violates the Privilege [sic] and Immunities Clause of Article IV § 2, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the Commerce Clause and the right to interstate travel. Complaint, ¶¶ 59-64. Additionally, Plaintiff claims that the bona fide office requirement under N.J.Ct.R. 1:21-1(a) violates the Privileges and Immunities Clause of Article IV § 2, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the Commerce Clause, the First Amendment and the right to interstate travel. Complaint, ¶¶ 78-84.

Presently before the Court are Defendants[1] [sic] motions for summary judgment. Defendants contend that Plaintiff's complaint fails to state a claim upon which relief can be granted because neither the mandatory attendance requirement nor the bona fide office requirement violate any provisions of the United States Constitution. The

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[1] Motions for summary judgment were filed separately on behalf of Defendants ICLE and Joseph J. Hogya, Esq. (hereinafter "ICLE"), and Defendants Supreme Court of New Jersey, Robert Wilentz, Stephen W. Townsend, New Jersey State Board of Bar Examiners and Samuel J. Uberman (hereinafter "New Jersey"). Except as otherwise indicated, the Defendants will be referred to collectively as "Defendants".

mandatory attendance requirement does not violate the Privileges and Immunities Clause because it applies equally to both in-state and out-of-state residents.

Defendants argue the Due Process Clause is not violated by the mandatory attendance requirement because sufficient standards have been established to avoid arbitrary administration of the skills and methods course. Specifically, Defendants claim the Advisory Committee on Bar Admissions, on which the Board of Bar Examiners sat, made specific recommendations concerning the curriculum for the skills and methods course. These recommendations were ultimately adopted by the Supreme Court of New Jersey and implemented by ICLE.

Defendants also take the position that Plaintiff's Equal Protection claim is meritless because the mandatory attendance requirement is rationally related to New Jersey's legitimate interest of preparing young attorneys for the rigors of legal practice. Moreover, Defendants contend that Plaintiff's claim that the mandatory attendance requirement violates the Commerce Clause is meritless because the requirement does not discriminate against interstate commerce. Similarly, Defendants insist that Plaintiff's right to travel claim is meritless because the mandatory attendance requirement actually encourages and promotes interstate travel.

Defendants also contend that the bona fide office requirement is constitutional in that it does not violate the Privileges and Immunities Clause because the

requirement applies to both resident and non-resident attorneys. Furthermore, Defendants claim that the bona fide office requirement does not violate the Due Process or Equal Protection Clauses because the requirement is rationally related to New Jersey's interest in insuring that non-resident attorneys are available to local courts, practitioners and clients and promotes familiarity with local practice and procedure. Defendants do not address Plaintiff's Commerce Clause, First Amendment or right to travel claims.

Plaintiff opposes some, but not all, of the arguments raised by Defendants' summary judgment motion. Plaintiff counters Defendants' arguments concerning his Privileges and Immunities claim by asserting that the mandatory attendance policy and bona fide office requirement, while not discriminating against out-of-state attorneys per se, places an undue burden on the right of out-of-state residents to practice law in New Jersey. Plaintiff claims that the mandatory attendance policy and the bona fide office requirements are protectionist measures by the New Jersey Bar to prevent New York and Philadelphia lawyers from practicing law in New Jersey. Transcript from oral argument, June 12, 1995, 13:23-14:6 ("Tr."). As such, Plaintiff claims that "New Jersey is the last bastion of protectionism against out-of-state lawyers". Tr. 13:22-13:23. Plaintiff also claims that the mandatory attendance policy is arbitrary and capricious and violates Due Process because no format or curriculum has been promulgated, contrary to N.J. Court Rule 1:26. Plaintiff fails to oppose Defendants' motion for

summary judgment on the remaining constitutional claims.

DISCUSSION

I. Standard for Summary Judgment[2]

Summary judgment may be granted only if all probative materials of record, viewed with all inferences in favor of the non-moving party, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986); Todaro v. Bowman, 872 F.2d 43, 46 (3d Cir. 1989). An issue is "genuine" if a reasonable jury could possibly hold in the non-movant's favor with regard to that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A fact is "material" if it influences the outcome under the applicable law. Id. at 248.

The moving party bears the initial burden of demonstrating either (1) that there is no genuine issue of fact and that as a matter of law, the moving party must prevail, or (2) that the non-moving party has not shown facts relating to an essential element of the issue for which it bears the burden. Celotex at 331. Once either showing is

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[2] Essentially, Defendants [sic] motions seek judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). However, since the Defendants have relied on submissions outside the pleadings in support of their motions, Defendants' motions will be treated as motions for summary judgment pursuant to Fed.R.Civ.P. 56(c).

made, the burden shifts to the non-moving party, who must demonstrate facts which support each element for which it bears the burden and establish the existence of genuine issues of material fact. Id. at 333, n.3. To satisfy this burden, the non-moving party "may not rest upon the mere allegations or denials" of its pleading. Fed.R.Civ.P. 56(e). Rather, it must produce sufficient evidence to support a jury verdict in its favor, see Anderson at 249, and not just create "some metaphysical doubt as to material facts." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

The burden of persuasion, however, always remains with the moving party. If there is any reasonable doubt as to the necessity of a trial, summary judgment should not be granted. Celotex at 331; see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-61 (1970).

II. Mandatory Attendance at Skills and Methods Course

N.J.Ct.R. 1:21-1(a), in pertinent part, provides:

> Except as provided below, no person shall practice law in [the State of New Jersey] unless that person is an attorney holding a plenary license to practice in this state, has complied with the R. 1:26 skills and methods course in effect on the date of the attorneys admission, is in good standing, and maintains a bona fide office for the practice of law in this state regardless of where the attorney is domiciled.

N.J.Ct.R. 1:26, in pertinent part, provides:

> All newly admitted attorneys shall successfully complete a skills and methods course that has been approved by the Supreme Court. The course format shall be set forth in the rules of the Board of Bar Examiners. . . . Pursuant to R. 1:21-1(a), failure to complete the course successfully shall render an attorney ineligible to practice law.

In a report issued May 31, 1984, the New Jersey Supreme Court's Advisory Committee on Bar Admission[3] made a recommendation to the Supreme Court that attendance at the skills and methods course be mandatory. Townsend Aff. ¶ 3. The Advisory Committee also made certain recommendations concerning the curriculum of the skills and methods course. See 113 N.J.L.J. 678-679. The Supreme Court referred the Committee's recommendations to an ad hoc working group to develop proposals to restructure the skills and methods course accordingly. Townsend Aff. ¶ 4. On January 30, 1986, proposals were published by the Supreme Court for public comment in the New Jersey Law Journal. Id. Following a period of public comment, the Supreme Court adopted, and ICLE implemented, the proposals developed by the ad hoc working group, upon the recommendations of the advisory committee. Id. at ¶ 5. Since their implementation, ICLE has enforced the proposals developed by the ad hoc working group, including the mandatory attendance policy. Hogya Aff. ¶ 4.

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[3] Each member of the Board of Bar Examiners sat on the Advisory Committee.

Currently, the skills and methods course is offered by ICLE four times per year, in three different scheduling formats, in locations throughout the State. While registrants are free to choose the time and format which is most convenient for them, registrants are required to physically attend all lectures.[4] Id. at ¶ 5.

A. Privileges and Immunities Clause

Plaintiff's complaint alleges that the mandatory attendance policy violates the Privileges and Immunities Clause of the United States Constitution. Defendants claim that the mandatory attendance requirement is constitutional due to the fact that it applies equally to resident and non-resident attorneys.

Article IV, § 2, of the Constitution provides "[c]itizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States". The Privileges and Immunities Clause was intended to "fuse into one Nation a collection of independent sovereign States". Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 279 (1985) (quoting Toomer v. Witsell, 334 U.S. 385, 395 (1948). Thus, the Privileges and Immunities Clause applies "[o]nly with respect to those 'privileges' and 'immunities' bearing on the vitality of the nation as a

[4] Registrants may request an exemption from an individual lecture. If granted, the registrant is required to make up the lecture in one form or another. A complete waiver as to all lectures has never been allowed.

single entity". Piper, 470 U.S. at 279 (quoting Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 383, (1978).

The practice of law has consistently been considered a "privilege" under Art. IV, § 2. Barnard v. Thorstenn, 489 U.S. 546, 553, (1989); Supreme Court of Virginia v. Friedman, 487 U.S. 59, 65, (1988); Piper, 470 U.S. at 279-283. This is so because the legal profession not only plays a vital role in the national economy, but also facilitates the vindication of important federal rights. See Piper, 470 U.S. at 281. Thus, states may not discriminate against non-resident attorneys right to practice law.

In Piper, the Supreme Court struck down a New Hampshire residency requirement which limited state bar admission to New Hampshire residents. Piper, 470 U.S. at 274. The Piper Court determined that the residency requirement deprived non-residents of a protected privilege. Id. at 284. The Piper Court also determined that the discrimination against non-residents was not substantially justified since less restrictive alternatives, including mandatory attendance at seminars on state practice, supported the State's interest in insuring that admitted attorneys were familiar with local rules and procedure. Id. at 284-286.

Similarly, in Friedman, the Supreme Court struck down a rule which allowed attorneys who were licensed in another state, and had become permanent residents of Virginia, admission to the Virginia bar simply on motion.

Friedman, 487 U.S. at 62. Non-residents of Virginia admitted to practice in another state, however, were required to take the Virginia bar exam. The Supreme Court determined that Virginia's discretionary admissions policy violated the Privileges and Immunities Clause by denying non-resident attorneys the opportunity to practice law in Virginia on terms substantially equal to those of resident attorneys. Id. at 70.

More recently, in Barnard, the Supreme Court struck down a residency requirement incorporated into a local District Court Rule which provided that before an otherwise qualified attorney could be admitted to the Virgin Islands Bar he/she must establish he/she "resided in the Virgin Islands for at least one year immediately preceding his[/her] proposed admission" and that "[i]f admitted to practice, he[/she] intends to continue to reside in and to practice law in the Virgin Islands". Barnard, 489 U.S. at 552-559. The Supreme Court held that the residency requirement violated the Privileges and Immunities Clause by excluding non-residents from the Virgin Islands Bar. Id. Moreover, the Court determined that the residency requirement did not bear a substantial relation to the Virgin Islands District Court's objectives of, among other things, insuring the availability of non-resident attorneys and maintaining an adequate level of competence in local law. Id.

In the present case, neither Piper, Freidman nor Barnard is applicable. Here, the mandatory attendance requirement applies equally to in-state and out-of-state

residents because both resident and non-resident attorneys are required to physically attend the skills and methods class. Thus, the Privileges and Immunities Clause is not implicated since in-state and out-of-state attorneys are given the opportunity to practice law in New Jersey on identical terms. See Friedman, 487 U.S. at 67; Schumacher v. Nix, 965 F.2d 1262, 1265, n. 4 (3d Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1252 (1993).

Nevertheless, Plaintiff asserts that the mandatory attendance policy is discriminatory because it is a calculated measure to preserve the legal market for local attorneys. Tr. 13:22-14:6. Plaintiff also claims that the mandatory attendance policy unduly burdens out-of-state attorneys who are expected to work long hours and are not able to travel to New Jersey to physically attend the skills and methods class. See Tolchin brief in opposition to summary judgment, ¶¶. 16-17; Tolchin Aff. ¶ 8.

Plaintiff's arguments fail to establish a violation of the Privileges and Immunities Clause. Plaintiff evidently believes that because it is inconvenient for him to physically attend the skills and methods course in New Jersey, the mandatory attendance policy is unconstitutional. Plaintiff misconstrues the scope of the Privileges and Immunities Clause.

The purpose of the Privileges and Immunities Clause is "to insure to a citizen of State A who ventures into State B the same privileges that which the citizens of State B enjoy". Lutz v. City of York, Pa., 899 F.2d 255, 262 (3d Cir. 1990)(quoting Toomer, 334 U.S. at 395). States

are under no obligation to make affirmative accommodations to out-of-state residents who find a particular requirement personally burdensome. In this case, Plaintiff claims that it is inconvenient to physically attend lectures in New Jersey. Plaintiff also submits the affidavit of an attorney who resides in New York, but practices in Newark, New Jersey, who claims to find it unreasonably dangerous utilizing public transportation to physically attend the skills and methods course in New Jersey. Affidavit of Amy B. Wagner, ¶ 4; Tr. 36:20-36:25. Plaintiff states that his colleague should not have to "put her life on the line . . . in order to become a member of the Bar in New Jersey". Tr. 36:25-37-2.

Despite Plaintiff's concerns, he and other non-resident attorneys face no greater burden or any more or less inconvenience to attend the skills and methods class in New Jersey than do resident attorneys. Arguably, it is just as inconvenient for an attorney residing in Cape May or High Point New Jersey to travel to the closest lecture site as it is for Plaintiff, or his colleague, to travel to and from New York to the nearest or closest available lecture site in New Jersey. It is for that very reason that ICLE offers the skills and methods class four times a year, in three different scheduling formats, in locations throughout the state. In light of the above, the Court finds that the mandatory attendance policy does not violate the Privileges and Immunities Clause of Article IV § 2.

B. Due Process

Plaintiff's complaint also alleges that, contrary to N.J. Court Rule 1:26, Defendants have failed to promulgate a format or curriculum for the skills and methods course and that such failure is arbitrary and capricious and violates Plaintiff's right to due process of law.

In pertinent part, the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty or property without due process of law". To satisfy the requirements of the Due Process Clause, laws must provide specific standards which avoid arbitrary and discriminatory enforcement. Grayned v. Rockford, 408 U.S. 104, 109 (1972).

Plaintiff claims that the failure of the Board of Bar Examiners to promulgate rules concerning the format of the skills and methods course renders the mandatory attendance requirement arbitrary and capricious. Plaintiff alleges that Defendants' failure to promulgate rules concerning the format of the course has deprived him of the opportunity of satisfying the ICLE requirements in an equivalent course in New York or through home studies.

Defendants counter in support of their motion for summary judgment that specific rules concerning the format of the skills and methods course have been promulgated and therefore summary judgment is appropriate. Defendants point to the recommendation made by the Supreme Court's Advisory Committee on Bar Admissions, comprised of all the members of the Board of Bar Examiners, which recommended, among

other things, mandatory attendance at the skills and methods course. Defendants state that the Committee's recommendations, which were later approved by the Supreme Court, provide specific standards which guides the administration of the skills and methods course.

This Court is satisfied that appropriate guidelines have been established to avoid arbitrary administration of the skills and methods course. As early as June 1984, the Advisory Committee on Bar Admissions, on which all members of the Board of Bar Examiners sat, made numerous recommendations concerning the administration of the skills and methods course. 113 N.J.L.J. at 678-679. In a report published by the New Jersey Law Journal on June 21, 1984, the Committee recommended that the skills and methods course be offered in eight week cycles in the Spring and Fall of each year. Id. at 678. The Committee also recommended that the skills and methods course be composed of eight "core" courses including: Professional Responsibility, Trial Practice and Procedure, Real Property, Family Law, Wills and Estates, Probate and Estate Administration, Small Business Problems and Administrative Law. Id. The Committee further recommended that each of the eight "core" courses should consist of two three-hour mandatory lectures and a mandatory written exercise. Id. In order to successfully complete the skills and methods course, the Committee recommended that the course be completed within two years following admission to the bar. Id.

Thereafter, in January 1986, an ad hoc working group consisting of members of the New Jersey State Bar Association, the Bar Association's Young Lawyers' Division, the ICLE Advisory Board, the ICLE professional staff and individuals from the Advisory Committee on Bar Admissions published proposals to restructure the skills and methods course in the New Jersey Law Journal. 117 N.J.L.J. 115. The ad hoc working group essentially adopted the recommendations of the Advisory Committee on Bar Admissions with certain modifications.

The group proposed that the skills and methods course be separated into "core" and "elective" components. Id. at 131. They suggested that the "core" program consist of five subjects: Professional Responsibility, Real Estate, Will Drafting and Probate Practice, Family Law and either Civil or Criminal Practice. Id. The working group also proposed that mandatory attendance and mandatory completion of practice exercises would be required for successful completion of the skills and methods course. Id. In order to provide greater flexibility to participants, the working group suggested that the "core program" be offered four times per year. Id. The group also proposed that upon completion of the "core" program, participants would be required to take the remaining trial course (Civil or Criminal) and Administrative Law in year two. Id. Finally, the working group suggested that in year three participants would select two courses among: Small Business Problems, Bankruptcy, Collection Practice, Municipal Land Use, Workers' Compensation or other comparative courses

offered in the ICLE curriculum. Id.

Following a period of public comment, the Supreme Court of New Jersey adopted the working group's proposals for restructuring the skills and methods course. Townsend Aff. ¶¶ 4-5. ICLE has administered the skills and methods course in accordance with the proposals ever since[5]. Id. at ¶ 5.

Far from being arbitrary and capricious, the Supreme Court of New Jersey, with the assistance and input of others, has painstakingly developed the curriculum for the skills and methods course. The curriculum adopted by the Supreme Court clearly articulates the format for the skills and methods course. As the report of the Advisory Committee on Bar Admission and the proposals of the ad hoc working group

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[5] Presently, all candidates who apply to take the New Jersey Bar Exam receive a booklet from the Clerk of the Supreme Court titled "ADMISSION TO THE BAR". The booklet includes, among other things, a description of the skills and methods course. The description states "The Skills and Methods Course is designed to familiarize new members of the New Jersey Bar with some important procedures and techniques of the day-to-day practice of law in New Jersey". The description also states:

> The Skills and Methods course is now made up of a five section "Core Program" to be taken during the year following the bar examination, a two section program to be taken during the second year following the bar examination, and a two-section program to be taken during the third year following the bar examination.

Each candidate also receives an ICLE course brochure which describes in detail the curriculum for the skills and methods course. Thus, each candidate for admission to the New Jersey Bar receives notice of the curriculum for the skills and methods course prior to admission to the Bar.

indicate, the curriculum for the skills and methods course was developed to help young lawyers "bridge the gap" between law school and the practice of law. The "core" courses reflect those topics neophyte attorneys are most likely to encounter in their early years of practice. The mandatory attendance requirement, in conjunction with the mandatory practice exercises requirement, promotes New Jersey's legitimate interest in ensuring that newly admitted attorneys are familiar with local practice and procedure.

This Court is more than satisfied that the curriculum adopted by the New Jersey Supreme Court in 1986, and followed by ICLE ever since, avoids any possibility of the skills and methods course being administered in an arbitrary and capricious manner. Moreover, while the curriculum for the skills and methods course may not be specifically set forth in the Rules of the Board of Bar Examiners, it is clear by its participation with the Advisory Committee on Bar Admissions that the Board of Bar Examiners was crucial in adopting the curriculum for the skills and methods course.

C. Equal Protection

Plaintiff alleges that the mandatory attendance requirement, as a prerequisite for successful completion of the skills and methods course, is a violation of the Equal Protection Clause of the Fourteenth Amendment. Plaintiff does not oppose Defendants' motion for summary

judgment on this claim. Therefore, Plaintiff's Equal Protection claim may be consider abandoned[6]. [sic] However, the Court will assume that Plaintiff's Equal Protection claim has not been abandoned.

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws". The threshold question for our equal protection analysis is what standard governs our analysis of the mandatory attendance policy. "As a general matter, economic and social legislation is subject to rational basis review, under which a law need only be 'rationally related to a legitimate state interest'." Schumacher, 965 F.2d at 1266 (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam)) However, where legislation establishes a classification that implicates fundamental rights or draws upon suspect distinctions such as race, religion, or alienage, the legislation must meet strict scrutiny analysis.

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[6] While the burden of proof may lie on the moving party on a motion for summary judgment, the opposing party

> may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial.

California Natural, Inc. v. Nestle Holdings, Inc., 631 F. Supp. 465, 470 (D.N.J. 1986); Fed. R. Civ. P. 56(e). The Court shall rule "on the record the parties have actually presented, not one potentially possible". California Natural, 631 F. Supp. at 470 (quoting Madeirense v. Stulman, 147 F.2d 399 (2d Cir. 1945); See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). "If a party fails to respond in the required manner, the court may, if appropriate, enter summary judgment against it." California

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Schumacher, 965 F.2d at 1266.

Plaintiff claims that the mandatory attendance policy denies him the "fundamental" right to practice law. The right to practice law, however, has never been considered a fundamental right. See Scariano, F.3d at 924; Verner, 533 F. Supp. at 1116. As such, "[a] state can require high standards of qualification such as good moral character or proficiency in the law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Schware v. Board of Law Examiners of New Mexico, 353 U.S. 232, 239 (1957). A state may also set strict requirements for continuing legal practice. Verner, 533 F. Supp. at 1117. Therefore, Plaintiff's claim that the mandatory attendance requirement is denying him the right to practice law is subject to rational basis review.

"Under a rational basis test, a law is entitled to a presumption of validity." Parham v. Hughes, 441 U.S. 347, 351 (1979). "A court will not disturb the law as long as it is rationally related to a legitimate government interest". Scariano, 38 F.3d 924 (citing Schumacher, 965 F.2d at 1269.

As stated earlier, the Court does not believe that the mandatory attendance requirement burdens non-resident attorneys any more, or any less, than resident attorneys. This is so because all attorneys admitted to

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Natural, 631 F. Supp. at 470.

practice law in New Jersey are required to physically attend the skills and methods course, regardless of residence. However, even assuming, the mandatory attendance requirement had a disproportionate impact on nonresident attorneys, the Court finds that mandatory attendance policy is rationally related to a legitimate government interest. Indeed, the skills and methods course was developed to assist young attorneys make the transition from law school to the practice of law. The course is geared to emphasize those topics young attorneys are likely to face in their early years of practice. The mandatory attendance requirement simply furthers the benefits and assures compliance with the skills and methods requirement by demanding physical attendance. Thus, while Plaintiff may believe that the mandatory attendance policy places an undue burden on out-of-state attorney's ability to practice law in New Jersey, and less restrictive alternatives are available, the Court finds that the mandatory attendance policy reasonably promotes New Jersey's interests in insuring a minimum competency level for newly admitted attorneys.

D. Commerce Clause

Plaintiff's complaint also alleges that the mandatory attendance policy unduly burdens interstate commerce. While Plaintiff does not oppose Defendants' motion for summary judgment on this claim, the Court will assume that Plaintiff's Commerce Clause claim is not abandoned.

Article I § 8 of the Constitution provides "Congress shall have Power . . . To regulate commerce . . . among the several States." Generally, two tests are applied in constitutional challenges under the Commerce Clause. First, if legislation is facially neutral, and only has an incidental effect on commerce, the legislation will be upheld unless the burden on commerce is "clearly excessive in relation to the putative local benefits". Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Alternatively, if legislation is discriminatory, the legislation will be invalidated unless justified by reasons unrelated to economic protectionism. Brown-Forman Distillers Corp. v. New York Liquor Authority, 476 U.S. 573, 579 (1986); Government Suppliers Consolidating Services, Inc. v. Bayh, 975 F.2d 1267, 1277 (7th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 977 (1993).

In the present case, since the mandatory attendance policy applies equally to resident and non-resident attorneys, the Court will apply the Pike test. See Lutz v. City of York, Pa., 899 F.2d 255, 265 (3d Cir. 1990). Therefore, the mandatory attendance policy will be upheld unless its burden on interstate commerce outweighs its local benefits.

The Court is satisfied that the benefits of the mandatory attendance policy clearly outweigh the burden, if any, on interstate commerce. The skills and methods course serves a legitimate educational purpose. The course prepares young attorneys for the rigors of legal practice in New Jersey. The course also serves the

important function of protecting the public from untrained attorneys. Mandatory attendance simply advances the benefits and assures compliance with the skills and methods course requirement.

Further, the Court finds it difficult to imagine that an out-of-state attorney would forego admission to the New Jersey bar simply because he\she [sic] were required to physically attend the skills and methods course. Thus, the Court questions whether the mandatory attendance policy actually burdens interstate commerce. Accordingly, the Court finds the mandatory attendance policy for the skills and methods course does not violate the Commerce Clause.

E. Right to Interstate Travel

Plaintiff's complaint alleges that the mandatory attendance requirement unduly and illegally restricts his right to travel. While Plaintiff does not oppose Defendants' motion for summary judgment on this claim, the Court will assume that Plaintiff's right to travel claim is not abandoned.

"[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution." Schumacher, 965 F.2d at 1266 (quoting United States v. Guest, 383 U.S. 745, 758 (1966)). However, "[t]he practice of law [] is not a fundamental right or activity". Scariano, 852 F. Supp. at 715 (citing Leis, 439 U.S. at 444). Thus, "[t]he Constitution does not

guarantee that Citizens of State A may move to State B and enjoy the same privileges they did as Citizens of State A, only that citizens of State A may move to State B and be treated on similar terms as the citizens of State B." Schumacher, 965 F.2d at 1267. Nor does the right to travel "require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another". Schumacher, 965 F.2d at 1268 (quoting Leis, 439 U.S. at 443).

A state law implicates the right to travel when it actually deters such travel, when impeding travel is the laws primary objective or when the law uses classifications which serve to penalize the exercise of the right to travel. Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 903 (1986). Here, Plaintiff claims that the mandatory attendance policy unduly restricts his right to travel and practice law. However, the Court cannot fathom how a requirement which is applicable to in-state and out-of-state residents alike, burdens Plaintiff's right to travel or practice law. See Lair v. Goldenhersh, 716 F.2d 401, 412 (7th Cir. 1983) ("[r]equiring [Plaintiff] to sit for and pass the bar examination does not amount to a denial of a basic necessity of life . . . nor does it infringe on a fundamental right."). This is especially true in light of the great deference granted to states in regulating the practice of law. See Schware, 353 U.S. at 239. Moreover, since the mandatory attendance policy applies to in-state and out-of-state residents alike, the policies primary objective is not impeding travel. Nor does the mandatory attendance policy use any classifications which penalize

the exercise of the right to travel or practice law.

In light of the above, the Court finds that Plaintiff has failed to demonstrate that requiring mandatory attendance at the skills and methods course is unconstitutional. First, the mandatory attendance requirement does not discriminate against out-of-state attorneys because the requirement applies equally to resident and non-resident attorneys. Moreover, mandatory attendance furthers the benefits and assures compliance with the skills and methods requirement. Accordingly, the Court recommends that Defendants' motions for summary judgment be granted and Plaintiff's claims concerning the mandatory attendance policy be dismissed.

II. Bona Fide Office Requirement[7]

A. Privileges and Immunities Clause

Plaintiff's complaint alleges that the bona fide office requirement, incorporated in N.J. Court Rule 1:21-1(a)[8], violates the Privileges and Immunities clause because the requirement places an undue burden on out-of-state attorneys. The Supreme Court of New Jersey seeks to

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[7] Plaintiff's complaint alleges that the bona fide office requirement violates numerous constitutional provisions. Plaintiff seeks to hold all Defendants liable for these alleged constitutional violations. However, Plaintiff's complaint is devoid of any basis for holding any Defendants, except the New Jersey Supreme Court, liable for these alleged constitutional violations. Indeed, Art. 6, § 2, ¶ 3 reads "The Supreme Court shall make rules governing the administration of all courts in the state and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted". See State v. Bander, [106] N.J. Super. 196, 200 (Monmouth County Ct.), rev'd. on other grounds, 56 N.J. 1986 (1969) ("It is now well settled in our State that the Supreme Court has exclusive jurisdiction over the practice of law.").

Thus, the Supreme Court of New Jersey is vested with the exclusive authority over the practice of law. Plaintiff's complaint and brief in opposition to the present motion for summary judgment fail to allege that any Defendant, other than the Supreme Court of New Jersey, was responsible for the promulgation and enforcement of R. 1:21-1(a). Accordingly, except for the Supreme Court of New Jersey, the Court recommends that Defendants' motion for summary judgment dismissing Plaintiff's claims related to the bona fide office requirement be granted.

[8] Rule 1:21-1(a), in relevant part, provides:

> [A] bona fide office is a place where the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours. A bona fide office is more than a mail drop, a summer home that is unattended during a substantial portion of the year, or an answering service unrelated to a place where business is conducted.

dismiss Plaintiff's Privileges and Immunities claim on the basis that the bona fide office requirement does not violate the Privileges and Immunities Clause because it applies equally to resident and non-resident attorneys. See Schumacher, 965 F.2d at 1265, n.4.

Significantly, Plaintiff relies on Frazier v. Heebe, 482 U.S. 641 (1987)[9] in opposition to the Supreme Court of New Jersey's motion for summary judgment. In Frazier, the Supreme Court struck down a local District Court Rule which required out-of-state attorneys to maintain an in-state office. Id. The Frazier Court found the in-state office requirement unnecessary and irrational because it did not apply to in-state attorneys. Id. at 649. The Frazier Court noted that a resident attorney could maintain his only office out-of-state and still be admitted to practice in the local District Court. Id. The Court found the distinction irrational and unnecessary because a resident attorney with his/her only office out-of-state was no more available to the Louisiana Court, or no more knowledgeable in Louisiana law, than a non-resident attorney with an office out-of-state. Id.

The Frazier case is readily distinguishable from the case at bar. The bona-fide office requirement here is neither unnecessary nor irrational because it applies to in-state and out-of-state residents alike and provides New

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[9] In Frazier, the Court did not reach the constitutional issues raised by Plaintiff because the Court invalidated the residency and in-state office requirement pursuant to its supervisory authority over the District Courts.

Jersey with a reasonable avenue through which the State can protect its interest in insuring that attorneys licensed in New Jersey are available to New Jersey Courts, practitioners and clients and familiar with local practice and procedure. See Friedman, 487 U.S. at 69-70 (following the Frazier decision, the Supreme Court recognized that an in-state office requirement was an appropriate and less restrictive means of enforcing Virginia's full-time practice restriction); see e.g. R. 1:21-1(a).

Plaintiff's case is a perfect illustration of how the bona fide office requirement promotes New Jersey's interests. At oral argument, Plaintiff indicated that he was considering accepting employment at a law firm in either Mexico or the Netherlands. Tr. 9:10-9:18. Plaintiff indicated that he may prefer to represent the interest of his Dutch or Mexican clients in New Jersey. Id. It is easy to envision the difficulty an adversary or the Court may have in communicating and scheduling conferences with Plaintiff if he did not have a bona fide office in New Jersey. While Plaintiff's example may be extreme, it illustrates the potential difficulties New Jersey Courts and New Jersey practitioners could experience absent the bona fide office requirement.

Moreover, the bona fide office requirement does not violate the Privileges and Immunities Clause because the requirement applies equally to resident and non resident attorneys[10]. As such, resident and non-resident attorneys

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[10] At oral argument, Plaintiff attempted to persuade the
(continued next page)

have the opportunity to practice law in New Jersey on exactly the same terms. See Friedman, 487 U.S. at 67; Schumacher v. Nix, 965 F.2d at 1265, n.4.

B. Due Process

Plaintiff's complaint also alleges that the bona fide office requirement deprives him of property without due process of law. The Supreme Court of New Jersey asserts generally in its motion for summary judgment that the bona fide office requirement does not violate Due Process. While Plaintiff does not oppose the Supreme Court's motion for summary judgment on this claim, the Court will assume that Plaintiff's due process claim is not abandoned.

"A person's 'right' or 'privilege' in the practice of law []has never been among those held to be 'fundamental' so only minimal scrutiny under the rational basis test is required to evaluate claims of deprivations of such a 'right' without due process." Verner, 533 F. Supp. at 1116; see also Scariano, 38 F.3d at 924. Under rational

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Court that it is more convenient and more economical for resident attorneys to maintain an office in New Jersey since resident attorneys can use their homes as a bona fide office. Plaintiff obviously misconstrues the bona fide office requirement and the Court therefore finds Plaintiff's argument unpersuasive.

As N.J.Ct.R. 1:21-1(a) indicates, a bona fide office is more than a mere address. It is a functioning office where an attorney or a representative can be reached during regular business hours. Regardless of residence, an attorney must go to some expense in order to comply with the bona fide office requirement. Moreover, in the Court's experience, most attorneys do not practice out of their homes.

basis review, "[a] court will not disturb the law as long as it is rationally related to a legitimate government interest". Scariano, 38 F.3d at 924.

Generally, states have "broad power to establish standards for licensing practitioners and regulating the practice of professions," Goldfarb, 421 U.S. at 792, so long as the regulations "have a rational connection with the applicant's fitness or capacity to practice law". Schware, 353 U.S. at 239. As has been discussed, the New Jersey bona fide office requirement was adopted to insure that attorneys admitted to practice law in the State of New Jersey are available to New Jersey Courts, practitioners and clients and familiar with local practice and procedure. The Court finds that the bona fide office requirement has a rational connection with an attorneys capacity to practice law.

As Plaintiff's case illustrates, it is not difficult to envision the trouble an adversary or the Court would have in communicating and scheduling conferences with an attorney, such as Plaintiff, who resided in Mexico or the Netherlands, and who represented a client in New Jersey. Absent a bona fide office, Plaintiff would be virtually unreachable considering the differences in time zones and the exorbitant costs of communicating with Mexico or the Netherlands. Moreover, the Court questions whether Plaintiff could remain competent in local practice and procedure if he was employed and residing in either Mexico or the Netherlands. Accordingly, the Court finds that the bona fide office requirement is rationally connected

to an attorneys [sic] capacity to practice law.

C. Equal Protection

Plaintiff claims that the bona fide office requirement deprives him of equal protection of the law, in violation of the Fourteenth Amendment of the United States Constitution. The Supreme Court of New Jersey denies this claim. While the Plaintiff failed to oppose the Supreme Court's motion for summary judgment on this claim, the Court will assume that Plaintiff's Equal Protection claim is not abandoned.

As stated earlier, Plaintiff's Equal Protection claims are subject to rational basis review. See supra. pp. 16-19. As such, "[a] court will not disturb the law as long as it is rationally related to a legitimate government interest". Scariano, 38 F.3d at 924 (citing Schumacher 965 F.2d at 1269.).

The bona fide office requirement is certainly rationally related to the state's interest in insuring that attorneys admitted to practice law in New Jersey are available to New Jersey Courts and practitioners and familiar with local practice and procedure. As has been discussed, the bona fide office requirement enables local courts, practitioners and clients to more easily communicate with non-resident attorneys, whose practice may be focused out-of-state. While Plaintiff may find it inconvenient to establish a bona fide office in New Jersey, Plaintiff must also be cognizant of the interests of

his clients, the Court and other practitioners. The interests of clients, the Court and the legal community as a whole must take precedence over the convenience of individual attorneys. Accordingly, the Court finds that the bona fide office requirement is a reasonable regulation of the practice of law.

III. Sovereign Immunity

Plaintiff's complaint also alleges that the bona fide office requirement violates the Commerce Clause, First Amendment and the right to interstate travel. The Supreme Court's motion for summary judgment fails to address these remaining claims. Nevertheless, Plaintiff's remaining claims against the Supreme Court are barred by sovereign immunity.

The Eleventh Amendment of the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects or any Foreign State.

The Eleventh Amendment also bars actions by private citizens against state agencies sued as instrumentalities of the state regardless of the relief sought[11]. Pennhurst State

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[11] The Court finds that the Supreme Court of New Jersey is an instrumentality of the state for the purpose of the Eleventh

(continued next page)

School and Hospital v. Halderman, 465 U.S. 89, 100 (1984).

"It is well settled that, absent a clear waiver by a state of its sovereign immunity under the Eleventh Amendment or a congressional abrogation of that immunity, a federal court lacks jurisdiction to hear claims brought by an individual against a state". Jordan v. New Jersey Department of Corrections, 881 F. Supp. 947, 951 (D.N.J. 1995) (citing Pennhurst State School, 465 U.S. at 99). "It is also well settled that Congress did not intend to abrogate the sovereign immunity of the states under the Eleventh Amendment when it enacted 42 U.S.C. § 1983." Jordan, 881 F. Supp. at 951 (citing Edelman v. Jordan, 415 U.S. 651, 676-77 (1984)). Thus, if the Supreme Court of New Jersey has not waived its sovereign immunity, this Court lacks jurisdiction to hear Plaintiff's remaining claims.

"[T]he state of New Jersey has not waived its sovereign immunity from suits under 42 U.S.C. § 1983 generally". Neptune v. Burlington County College, 1993 WL 311960, *3 n.3 (E.D.Pa. 1993). Nor has the Supreme Court of New Jersey consented to be sued in this matter. See Id. Accordingly, since the Supreme Court of New Jersey has not waived its sovereign immunity, Plaintiff's remaining claims[12] against the Supreme Court are barred

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Amendment. See Johnson v. New Jersey, 869 F. Supp. 289, 296-297 (D.N.J. 1994) ("judicial branch is an integral part of the State of New Jersey" and therefore entitled to share in state's sovereign immunity).

[12] The Eleventh Amendment bars not only Plaintiff's claims

(continued next page)

by the Eleventh Amendment.

In light of the above, the Court finds that the bona fide office requirement is constitutional. The bona fide office requirement applies equally to resident and non-resident attorneys. Moreover, the bona fide office requirement promotes New Jersey's legitimate interest in insuring the availability and competence of attorneys admitted to practice in the State. Accordingly, the Court recommends that Defendants' motion for summary judgement [sic] be granted and Plaintiff's claims concerning the bona fide office requirement be dismissed.

CONCLUSION

For the reasons discussed above, it is the recommendation of the undersigned that Defendants' motions for summary judgment be granted and Plaintiff's complaint be dismissed.

Pursuant to Local Rule 40D.5, the parties have ten (10) days from the receipt of this Report and Recommendation to file and serve objections thereto.

Dated: [sic]

/s/
Dennis M. Cavanaugh, U.S.M.J.

---

for monetary damages, but Plaintiff's claims for equitable relief as well. See Cory v. White, 457 U.S. 85, 90-91 (1982) (recognizing that Eleventh amendment by its very terms applies to equitable claims).

Orig: Clerk
cc: Hon. William G. Bassler
File
Attorneys of record
Pro se Plaintiff

STATUTES INVOLVED

United States Constitution, article I, section 8, clause 3

Congress shall have the power to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.

(The Statutes section continues on the next page.)

NEW JERSEY RULES OF COURT

PART I. RULES OF GENERAL APPLICATION
CHAPTER III. PRACTICE OF LAW AND ADMISSION TO PRACTICE
RULE 1:21. PRACTICE OF LAW

N.J. Court Rules, 1969 R. 1:21-1 (1997)

Version currently in effect, reflecting June 28, 1996 amendment which was effective September 1, 1996 (see below for version in effect at time this action was commenced)

1:21-1. Who May Practice; Appearance in Court

(a) Qualifications. Except as provided below, no person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State, has complied with the R. 1:26 skills and methods course requirement in effect on the date of the attorney's admission, is in good standing, and maintains a bona fide office for the practice of law in this State regardless of where the attorney is domiciled. A bona fide office is more than a maildrop, a summer home that is unattended during a substantial portion of the year, an answering service unrelated to a place where business is conducted or a place where an on-site agent of the attorney receives and transmits messages only. For the purpose of this section, a bona fide office is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by

telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time. An attorney who practices law in this State and fails to maintain a bona fide office in this State shall be deemed to be in violation of RPC 5.5(a). An attorney who is not domiciled in this State, but who meets all the qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court. The designation of the Clerk as agent shall be made on a form approved by the Supreme Court.

A person not qualifying to practice pursuant to the first paragraph of this rule shall nonetheless be permitted to appear and prosecute or defend an action in any court of this State if the person (1) is a real party in interest to the action or the guardian of the party; (2) has been admitted to speak pro hac vice pursuant to R. 1:21-2; or (3) is a law student or law graduate practicing within the limits of R. 1:21-3.

No attorney authorized to practice in this State shall permit another person to practice in this State in the attorney's name or as the attorney's partner, employee or associate unless such other person satisfies the requirements of this rule.

(b) Appearance. All attorneys and pro se parties appearing in any action shall be under the control of the court in which they appear and subject to appropriate disciplinary action. An attorney admitted in another jurisdiction shall not be deemed to be making an appearance in this State by reason of taking a deposition pursuant to R. 4:11-4.

(c) Prohibition on Business Entities. Except as otherwise provided by paragraph (d) of this rule and by R. 1:21-1A (professional corporations), R. 6:10 (appearances in landlord-tenant actions), R. 6:11 (appearances in small claims actions), R. 7:4-2(b) (pleas in municipal court), R. 7:4-4(a) (presence of defendant in municipal court) and by R. 7:7-4 (municipal court violations bureau), a business entity other than a sole proprietor shall neither appear nor file any paper in any action in any court of this State except through an attorney authorized to practice in this State.

(d) Legal Services Organizations. Nonprofit organizations incorporated in this or any other state for the purpose of providing legal services to the poor or functioning as a public interest law firm, and other federally tax exempt legal services organizations or trusts, such as those defined by 26 U.S.C.A. 120(b) and 501(c)(20), which provide legal services to a defined and limited class of clients, may practice law in their own names through staff attorneys who are members of the bar of the State of New Jersey, provided that: (1) the legal work serves the intended beneficiaries of the organizational purpose, (2)

the staff attorney responsible for the matter signs all papers prepared by the organization, and (3) the relationship between staff attorney and client meets the attorney's professional responsibilities to the client and is not subject to interference, control, or direction by the organization's board or employees except for a supervising attorney who is a member of the New Jersey bar.

(e) Appearances Before Office of Administrative Law and Administrative Agencies. Subject to such limitations and procedural rules as may be established by the Office of Administrative Law, an appearance by a non-attorney in a contested case before the Office of Administrative Law or an administrative agency may be permitted, on application, in any of the following circumstances:

(1) where required by federal statute or regulation;

(2) to represent a state agency if the Attorney General does not provide representation in the particular matter and the non-attorney representative is an employee of the agency with special expertise or experience in the matter in controversy;

(3) to represent a county welfare agency if County Counsel does not provide representation in the particular matter and the non-attorney representative is an employee of the agency with special expertise or experience in the matter in controversy;

(4) to assist in providing representation to an indigent as part of a Legal Services program if the non-attorney is a paralegal or legal assistant employed by that program;

(5) to represent a state, county or local government employee in Civil Service proceedings, provided (i) the non-attorney making such appearance is an authorized representative of a labor organization and (ii) the labor organization is the duly authorized representative of the employee for collective bargaining purposes;

(6) to represent a close corporation provided the non-attorney is a principal of the corporation;

(7) to assist an individual who is not represented by an attorney provided (i) the presentation appears likely to be enhanced by such assistance, (ii) the individual certifies that he or she lacks the means to retain an attorney and that representation is not available through a Legal Services program and (iii) the conduct of the proceeding by the Office of Administrative Law will not be impaired by such assistance;

(8) to represent parents or children in special education proceedings, provided the non-attorney has knowledge or training with respect to handicapped pupils and their educational needs so as to enable the non-attorney to facilitate the

presentation of the claims or defenses of the parent or child.

(9) to represent union members and employees entitled to union representation in public employment relations proceedings, provided the appearance is by a union representative.

(10) to represent a county or local government appointing authority in Civil Service proceedings, provided the non-attorney representative is an employee of the appointing authority with special expertise or experience in the matter in controversy and the legal representative for the county or municipality does not provide representation in the particular matter.

No representation or assistance may be undertaken pursuant to subsection (e) by any disbarred or suspended attorney nor by any person who receives any fee for such representation.

NEW JERSEY RULES OF COURT

PART I. RULES OF GENERAL APPLICATION
CHAPTER III. PRACTICE OF LAW AND ADMISSION TO PRACTICE
RULE 1:21. PRACTICE OF LAW

N.J. Court Rules, 1969 R. 1:21-1 (1995)

Version in effect at time this action was commenced (see above for version currently in effect)

1:21-1. Who May Practice; Appearance in Court

(A) QUALIFICATIONS. Except as provided below, no person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State, has complied with the R. 1:26 skills and methods course requirement in effect on the date of the attorney's admission, is in good standing, and maintains a bona fide office for the practice of law in this State regardless of where the attorney is domiciled. For the purpose of this section, a bona fide office is a place where the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours. A bona fide office is more than a maildrop, a summer home that is unattended during a substantial portion of the year, or an answering service unrelated to a place where business is conducted. An attorney who practices law in this State and fails to maintain a bona fide office in this State shall be deemed to be in violation of RPC 5.5(a). An attorney who is not domiciled in this State, but who meets all the qualifications

for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court. The designation of the Clerk as agent shall be made on a form approved by the Supreme Court.

A person not qualifying to practice pursuant to the first paragraph of this rule shall nonetheless be permitted to appear and prosecute or defend an action in any court of this State if the person (1) is a real party in interest to the action or the guardian of the party; (2) has been admitted to speak pro hac vice pursuant to R. 1:21-2; or (3) is a law student or law graduate practicing within the limits of R. 1:21-3.

No attorney authorized to practice in this State shall permit another person to practice in this State in the attorney's name or as the attorney's partner, employee or associate unless such other person satisfies the requirements of this rule.

(B) APPEARANCE. All attorneys and pro se parties appearing in any action shall be under the control of the court in which they appear and subject to appropriate disciplinary action. An attorney admitted in another jurisdiction shall not be deemed to be making an

appearance in this State by reason of taking a deposition pursuant to R. 4:11-4.

(C) PROHIBITION ON BUSINESS ENTITIES. Except as otherwise provided by paragraph (d) of this rule and by R. 1:21-1A (professional corporations), R. 6:10 (appearances in landlord-tenant actions), R. 6:11 (appearances in small claims actions), R. 7:4-2(b) (pleas in municipal court), R. 7:4-4(a) (presence of defendant in municipal court) and by R. 7:7-4 (municipal court violations bureau), a business entity other than a sole proprietor shall neither appear nor file any paper in any action in any court of this State except through an attorney authorized to practice in this State.

(D) LEGAL SERVICES ORGANIZATIONS. Nonprofit organizations incorporated in this or any other state for the purpose of providing legal services to the poor or functioning as a public interest law firm, and other federally tax exempt legal services organizations or trusts, such as those defined by 26 U.S.C.A. 120(b) and 501(c)(20), which provide legal services to a defined and limited class of clients, may practice law in their own names through staff attorneys who are members of the bar of the State of New Jersey, provided that: (1) the legal work serves the intended beneficiaries of the organizational purpose, (2) the staff attorney responsible for the matter signs all papers prepared by the organization, and (3) the relationship between staff attorney and client meets the attorney's professional responsibilities to the client and is not subject to

interference, control, or direction by the organization's board or employees except for a supervising attorney who is a member of the New Jersey bar.

(E) APPEARANCES BEFORE OFFICE OF ADMINISTRATIVE LAW AND ADMINISTRATIVE AGENCIES. Subject to such limitations and procedural rules as may be established by the Office of Administrative Law, an appearance by a non-attorney in a contested case before the Office of Administrative Law or an administrative agency may be permitted, on application, in any of the following circumstances:

(1) where required by federal statute or regulation;

(2) to represent a state agency if the Attorney General does not provide representation in the particular matter and the non-attorney representative is an employee of the agency with special expertise or experience in the matter in controversy;

(3) to represent a county welfare agency if County Counsel does not provide representation in the particular matter and the non-attorney representative is an employee of the agency with special expertise or experience in the matter in controversy;

(4) to assist in providing representation to an indigent as part of a Legal Services program if the non-attorney is a paralegal or legal assistant

employed by that program;

(5) to represent a state, county or local government employee in Civil Service proceedings, provided (i) the non-attorney making such appearance is an authorized representative of a labor organization and (ii) the labor organization is the duly authorized representative of the employee for collective bargaining purposes;

(6) to represent a close corporation provided the non-attorney is a principal of the corporation;

(7) to assist an individual who is not represented by an attorney provided (i) the presentation appears likely to be enhanced by such assistance, (ii) the individual certifies that he or she lacks the means to retain an attorney and that representation is not available through a Legal Services program and (iii) the conduct of the proceeding by the Office of Administrative Law will not be impaired by such assistance;

(8) to represent parents or children in special education proceedings, provided the non-attorney has knowledge or training with respect to handicapped pupils and their educational needs so as to enable the non-attorney to facilitate the presentation of the claims or defenses of the parent or child.

(9) to represent union members and employees

entitled to union representation in proceedings before the Office of Administrative Law, the Department of Personnel, and the Public Employment Relations Commission, provided the appearance is by a union representative.

No representation or assistance may be undertaken pursuant to subsection (e) by any disbarred or suspended attorney nor by any person who receives any fee for such representation.

NEW JERSEY RULES OF COURT

PART I. RULES OF GENERAL APPLICATION
CHAPTER III. PRACTICE OF LAW AND ADMISSION TO PRACTICE

N.J. Court Rules, 1969 R. 1:26 (1995)

RULE 1:26. SKILLS AND METHODS COURSE

All newly admitted attorneys shall successfully complete a skills and methods course that has been approved by the Supreme Court. The course format shall be set forth in the rules of the Board of Bar Examiners.

Pursuant to R. 1:21-1(a), failure to complete the course successfully shall render an attorney ineligible to practice law. The director or other person in charge of an approved course shall to the Supreme Court the names of attorneys who are ineligible to practice because of their failure to comply with the requirements of the course.

A restoration to eligibility shall abide the correction of the deficiency and submission of the matter to the Supreme Court for its approval, which may be subject to such conditions as the Court deems appropriate.

No. 97-209

(2)

Supreme Court, U.S.
FILED
SEP 3 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

ROBERT J. TOLCHIN, individually and on behalf of all others similarly situated,

v. *Petitioner,*

THE SUPREME COURT OF THE STATE OF NEW JERSEY, ROBERT WILENTZ (intended to be the Chief Judge of the Supreme Court of New Jersey), STEPHEN W. TOWNSEND (intended to be the Clerk of the Supreme Court of New Jersey), THE NEW JERSEY STATE BOARD OF BAR EXAMINERS, SAMUEL J. UBERMAN (intended to be the Assistant Secretary of the New Jersey Supreme Court who plaintiff believes to direct the State Board of Bar Examiners), THE NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION and JOSEPH J. HOGYA (intended to be the Institute for Continuing Legal Education Skills Training Course Director),

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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36 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Respondents New Jersey Institute for Continuing Legal Education ("I.C.L.E.") and Joseph J. Hogya (collectively "the I.C.L.E. respondents") present the following counterstatement to the questions presented in the Petition for a Writ of Certiorari filed by Robert J. Tolchin ("the petitioner"):[1]

Whether a rule adopted by respondent New Jersey Supreme Court and implemented by the I.C.L.E. respondents, which requires that all attorneys newly admitted to the New Jersey bar attend skills and methods courses offered at a choice of locations in the State of New Jersey, is not violative of the Commerce Clause of the United States Constitution because it:

a. applies to both resident and nonresident attorneys, all of whom must attend the required courses;

b. serves legitimate state interests in regulating the legal profession and in ensuring that those who will be practicing in the State will be familiar with its laws and procedures; and

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[1] Neither New Jersey Institute for Continuing Legal Education nor Joseph J. Hogya, its skills and methods course director, have anything to do with the bona fide office rule which is the subject of two of the three questions which the Petition presents to the Court for review. Accordingly, this counterstatement addresses only the third question presented by the petitioner which concerns the mandatory attendance rule for the skills and methods course set forth in N.J.Ct.R. 1:21-1(a).

c. burdens, only incidentally, those attorneys who reside a distance from the multiple locations in New Jersey where the required courses are offered.

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II. THE SUPREME COURT HAS SUGGESTED REPEATEDLY THAT THE INTERESTS OF STATE OR FEDERAL COURT BARS, IN ASSURING THE COMPETENCE OF THEIR ATTORNEYS, MAY BE ADDRESSED BY REQUIRING MANDATORY ATTENDANCE AT SEMINARS ON LEGAL PRACTICE AND PROCEDURE.... 12

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CONSTITUTIONAL PROVISION AND STATE COURT RULES AT ISSUE

The Petition for a Writ of Certiorari presents the Court with questions concerning alleged violations of the Commerce Clause of the United States Constitution as a result of the application of two rules adopted by the New Jersey Supreme Court.

U.S. Const. art I, § 8

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes. . . .

N.J.Ct.R. 1:21-1(a)

> [N]o person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State, has complied with the R. 1:26 skills and methods course requirement in effect on the date of the attorney's admission, is in good standing, and maintains a bona fide office for the practice of law in this State regardless of where the attorney is domiciled. . . .

N.J.Ct.R. 1:26

> All newly admitted attorneys shall successfully complete a skills and methods course that has been approved by the Supreme Court. . . .

COUNTERSTATEMENT OF THE CASE

The New Jersey Supreme Court, in N.J.Ct.R. 1:26, requires that "[a]ll newly admitted attorneys shall successfully complete a skills and methods course that has

been approved by [it]." This Rule further provides that, "[p]ursuant to [N.J.Ct.]R. 1:21-1(a),[2] failure to complete the course successfully shall render an attorney ineligible to practice law." Accordingly, pursuant to these rules, any attorney who has passed the New Jersey bar examination since January 1, 1987, and has met the other plenary admission requirements of N.J.Ct.R. 1:27-1,[3] has been eligible for admission to the bar of the State of New Jersey. All such newly admitted attorneys, however, additionally have been required to complete the skills and methods course, referenced by the Supreme Court in N.J.Ct.R. 1:26, in order to maintain their eligibility to practice law.

The changes to N.J.Ct.R. 1:26, which became effective on January 1, 1987, were adopted by the New Jersey Supreme Court based on recommendations made in a May 31, 1984 report of the Advisory Committee on Bar Admissions, on which all members of the New Jersey Board of Bar Examiners sat. This report, published in the June 21, 1994 edition of the *New Jersey Law Journal*,[4] recommended that attendance at skills and methods

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[2] The pertinent text of N.J.Ct.R. 1:21-1(a) is set forth, *supra*, at page 1.

[3] In addition to passage of the New Jersey bar examination, the plenary admission requirements of N.J.Ct.R. 1:27-1(a) include: (a) certification of good character by the Committee on Character; and (b) attainment of a qualifying score on the Multi-State Professional Responsibility Examination or passage of an approved course on professional ethics.

[4] At all relevant times, the *New Jersey Law Journal* was the official organ for publication of all notices by the courts of New Jersey with respect to practice and procedure.

course lectures be mandatory and indicated that such attendance was "regarded as a serious matter."

Following receipt and review of the Advisory Committee's written report, the Supreme Court of New Jersey referred the recommendations to an ad hoc working group for the development of a concrete proposal for the restructuring of the skills and methods course which had been initiated in 1964 in order to address the lack of uniform quality in the prior pre-admission clerkship system. This ad hoc group submitted its proposal to restructure the skills and methods course, which also included a mandatory attendance requirement, to the Supreme Court of New Jersey. This formal "Proposal to Restructure [the] Skills and Methods Course" was published by the Supreme Court in the January 30, 1986 issue of the *New Jersey Law Journal*.

After a period which allowed for public comment, on June 17, 1986, the Supreme Court of New Jersey adopted the ad hoc group's proposal to restructure the skills and methods course, including the mandatory attendance requirement. I.C.L.E. was approved by the New Jersey Supreme Court to administer the restructured skills and methods course and was directed to implement the mandatory attendance policy. Based on the direction of the New Jersey Supreme Court, and with its approval, the I.C.L.E. respondents have applied the attendance requirement to residents and nonresidents of New Jersey alike.

Relying upon the format for the skills and methods course which was set forth in the "Proposal to Restructure" and adopted by the Supreme Court on June 17,

1986, I.C.L.E. prepares a skills and methods course brochure each winter, spring, summer and fall cycle. Brochures for the appropriate cycles are forwarded by I.C.L.E. to the New Jersey State Board of Bar Examiners for dissemination to all who apply for admission to the bar of the State of New Jersey. Petitioner's Complaint, which was filed in the United States District Court on October 12, 1994, appended as its "Exhibit A" the skills and methods course brochure which he had received for the Fall 1994 cycle. [IRa-1 to IRa-15].[5]

As this brochure indicates, the skills and methods course is a "bridge the gap" program designed to teach the local nuances of New Jersey practice [IRa-11] and to prepare attorneys for the transition from either law school to legal practice or legal practice in other states to practice in New Jersey. [IRa-1; IRa-11]. In order to achieve these objectives, the skills and methods course is divided into two components. [IRa-1]. The first component includes core courses in: (1) family law; (2) real estate; (3) will drafting and probate practice; (4) professional responsibility; and (5) civil or criminal trial preparation. [IRa-2]. The second component of the course consists of two phases of continuing education courses to expand knowledge of New Jersey practice. [IRa-4 to IRa-5].

The core courses are offered by I.C.L.E., four times a year, in spring, summer, fall and winter cycles at regional locations throughout the State of New Jersey. [IRa-2; IRa-4; IRa-14 to IRa-15]. The cycles are offered on several

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[5] The abbreviation "IRa" is used to identify the appendix of the I.C.L.E. respondents attached to this brief.

different schedules, including weekdays, evenings and Saturdays [IRa-2], with only the summer weekday cycle being presented on videotape. [IRa-4]. While the Petition indicates that the skills and methods courses are held "frequently at remote points within the State" [P-13], the brochure appended to petitioner's Complaint in this matter plainly reveals that two skills and methods course locations in northern New Jersey, one course location in central New Jersey and one course location in southern New Jersey were available to registrants for the core components offered in the fall of 1994.[6] [IRa-14 to IRa-15]. These New Jersey course locations in Newark, Whippany, New Brunswick and Cherry Hill cannot fairly be characterized as "remote."

Although registrants for core component skills and methods courses may choose the locations and time schedules which best suit their needs [IRa-2; IRa-7], they are required by the New Jersey Supreme Court to attend all of the courses for which they choose to register. [IRa-6]. In addition to this mandatory attendance requirement, registrants are required to prepare written exercises with regard to each core course which they attend. [IRa-3]. Exercises must be completed and submitted to I.C.L.E., by assigned dates, and passing grades must be received on all five exercises for the core courses which were attended. [IRa-3].

After completion of the core courses, registrants advance to the continuing education component of the

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[6] Similar choices of north, central and south Jersey locations always have been offered for all cycles.

skills and methods course. [IRa-4]. This component is broken down into two phases, comprised of two courses each. In the first phase, administrative law and either civil or criminal trial preparation must be taken. [IRa-5]. In the second phase, registrants can choose any two of the following courses: (1) purchase, organization and sale of a small business; (2) bankruptcy practice; (3) collection practice; (4) municipal court practice; (5) workers compensation practice; and (6) landlord/tenant practice. [IRa-5].

As the brochure appended to petitioner's Complaint reveals, lectures in the continuing education component of the skills and methods course are presented live, twice each year, in northern, central and southern New Jersey locations, and also are presented as video replays at various other times during the year. [IRa-4]. As with the core courses, registrants may choose the locations and time schedules which best suit their needs. [IRa-4; IRa-6]. All registrants, however, are required by the New Jersey Supreme Court to attend the courses which they choose in order to achieve successful completion of the continuing education component of the skills and methods course. [IRa-6].

Video replays of prior lectures are offered by I.C.L.E. to accommodate registrants who have chosen, for their own reasons and convenience, not to attend the live lectures when they were offered. [IRa-4]. Thus, while video replays of prior lectures may be part of the skills and methods course, based on the choices made by particular registrants, there is no support in the record for the statements in the Petition that "[o]nly a handful of the lectures are presented with a live lecturer" and "[t]he vast

majority of the classes are presented on video tape" without most registrants "ever seeing a live lecturer." [P-13]. These inaccurate representations provide no support for the petitioner's cause.

REASONS FOR DENYING THE WRIT

I.

THE PETITION ACKNOWLEDGES THE "WELL-ESTABLISHED PRECEDENT" OF THE SUPREME COURT SETTING FORTH THE ELEMENTS OF DORMANT COMMERCE CLAUSE ANALYSIS AND MERELY DISAGREES WITH HOW THE COURT OF APPEALS CONDUCTED THIS ANALYSIS.

In urging that certiorari should be granted, in this case, the petitioner has not argued that the elements of the dormant Commerce Clause, which have been enunciated repeatedly by this Court, are unclear or in conflict.[7] Instead, the Petition has acknowledged and cited, with approval, the "well-established precedent" [P-19] upon which the Third Circuit Court of Appeals relied in rendering its decision below. *See Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099, 1106-07 (3d Cir. 1997) (citing

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[7] Although the mandatory attendance rule for the skills and methods course was challenged below on a number of constitutional grounds, the Petition seeks certiorari solely on the ground that this state rule should have been found to be violative of the Commerce Clause. While Question No. 3, as presented in the Petition, does not identify the Commerce Clause as the constitutional provision at issue [P-i], the reasons presented by the petitioner for the granting of the writ address only this clause. [P-15 to P-25].

Brown-Forman Distillers Corp. v. New York Liquor Authority, 476 U.S. 573, 578-79 (1986); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). [Pa-13 to Pa-15].[8]

The thrust of the Petition, therefore, is that the Commerce Clause analysis, established in the foregoing Supreme Court cases and their progeny, was conducted incorrectly by the Court of Appeals. [P-20]. This argument does not provide a compelling basis for the granting of certiorari in this case because, in deciding that the mandatory attendance rule for the skills and methods course is not unconstitutional, the Third Circuit followed a long line of dormant Commerce Clause authorities.[9] Moreover, the Court of Appeals carefully and correctly analyzed the petitioner's constitutional challenge under existing authority. *Tolchin v. Supreme Court of New Jersey*, 111 F.3d at 1106-11. [Pa-12 to Pa-26].

In seeking to convince this Court that a writ of certiorari to the Third Circuit Court of Appeals is warranted with regard to the mandatory attendance rule for the skills and methods course, the petitioner has presented dual arguments that: (1) the challenged rule could not meet the heightened scrutiny test for dormant Commerce

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[8] The abbreviation "Pa" is used to identify the appendix attached to the Petition.

[9] The Supreme Court has recognized "that the Commerce Clause contains an implied limitation on the power of the states to interfere with or impose burdens on interstate commerce . . . in a long line of cases stretching back to the early days of the Republic." *Western and Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648, 652 (1981).

Clause analysis, which the Court of Appeals found inapplicable [P-20]; and (2) the more lenient standard, which the court below determined to be applicable, was not properly applied. [P-20; P-23 to P-25]. The Petition is unpersuasive, with regard to the first argument, because it provides no reason why the mandatory attendance rule for the skills and methods course, which is drafted in facially neutral terms and is applied to all attorneys newly admitted to the New Jersey bar, should be considered to be a regulation which directly discriminates against interstate commerce.

The Supreme Court has recognized repeatedly that it is only state regulations which directly regulate or discriminate against interstate commerce, or favor in-state economic interests, which are subject to strict or heightened scrutiny under the dormant Commerce Clause. *See, e.g., Hughes v. Oklahoma,* 441 U.S. 322, 337 (1979); *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. at 579. The Third Circuit Court of Appeals properly concluded, in its Commerce Clause analysis, that heightened scrutiny was not applicable with regard to the mandatory attendance requirement because it: (1) does not discriminate on its face; (2) applies equally to residents and nonresidents; and (3) does not effectively favor resident attorneys. *Tolchin v. Supreme Court of New Jersey,* 111 F.3d at 1108. [Pa-17]. The Petition, therefore, presents no compelling reason why certiorari should be granted to allow the Supreme Court to undertake a heightened scrutiny analysis which has not been shown to be warranted in this case. *See, e.g, United States v. Johnston,* 268 U.S. 220, 227 (1925) (the Supreme Court generally will deny certiorari where review is sought of a lower court decision

which turns solely upon an analysis of the particular facts involved).

Moreover, despite the petitioner's representation that this case presents an "important question of federal law" [P-15], this matter is not likely to produce an opinion which will give guidance to lower courts considering future dormant Commerce Clause cases. As the Petition reveals, the Third Circuit's decision with regard to the Commerce Clause challenge to the mandatory attendance rule is criticized principally for its alleged improper application of the balancing test set forth by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. [P-20; P-23 to P-24]. In short, petitioner suggests that the record does not contain adequate evidence to satisfy the *Pike* test which balances the burden on interstate commerce against the local benefit. [P-23].

As the Third Circuit properly recognized, under the *Pike* balancing test it is necessary only to consider "putative local benefits." 397 U.S. at 142. Such putative legislative or regulatory objectives must be "credibly advanced" in arguments to a court reviewing a statute or rule under the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Thus, in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987), the Supreme Court rejected a Commerce Clause claim, despite an Indiana corporate statute's effect on certain aspects of interstate commerce, because it was acknowledged that the State had a significant interest in regulating corporate entities within its borders and the Court was "not inclined 'to second-guess the empirical judgments of lawmakers concerning the utility of [the] legislation.' " (citation omitted).

In rendering its decision in this case, the Third Circuit emphasized both the traditional authority of state courts to control who may be admitted to practice before them and the compelling interest of the states in regulating the legal profession and the practice of law within their borders. *Tolchin v. Supreme Court of New Jersey*, 111 F.3d at 1110 (citing *Leis v. Flynt*, 439 U.S. 438, 444 n.5 (1979); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)). [Pa-25]. These judicially recognized interests, along with the reasons proffered for the mandatory attendance requirement by the I.C.L.E. respondents [IRa-1; IRa-11], properly led the Court of Appeals to conclude that mandatory attendance at the skills and methods course serves a "defensible educational purpose" which is "rationally connected to its intended benefit." *Id.* [Pa-23]. Under these circumstances, there was no reason for a fuller record to be developed to further investigate either the putative benefits or burdens advanced by the respective parties.[10] *Id.* at 1111 (citing *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859, 862 (4th Cir. 1985)). [Pa-25 to Pa-26]. Since the Petition seeks certiorari merely to review the sufficiency of facts upon which the Court of

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[10] The Petition represents that the record contains an "unrefuted affidavit" from "an expert in legal education" which was not considered by the Court of Appeals. [P-23 to P-24]. However, the decision of the Third Circuit expressly acknowledged the referenced affidavit and held that, despite its attempt to dispute some of the reasons proffered in support of the educational purpose of the mandatory attendance rule, it "failed to raise any genuine issue of material fact as to whether the mandatory attendance requirement is rationally related to its intended benefits." *Tolchin v. Supreme Court of New Jersey*, 111 F.3d at 1110. [Pa-23].

Appeals relied, a writ is not warranted. *See United States v. Johnston*, 268 U.S. at 227 (the Supreme Court "do[es] not grant a certiorari to review evidence and discuss specific facts").

Notwithstanding the petitioner's dissatisfaction with the Third Circuit's analysis of the mandatory attendance requirement under the dormant Commerce Clause, the decision below presents neither a reviewable nor a reversible question warranting the issuance of a writ of certiorari to the Third Circuit Court of Appeals. *See Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) (certiorari is not appropriate where the petitioner seeks to challenge only the correctness of the lower court's decision). The Supreme Court's authoritative voice often has been heard with regard to the application of Commerce Clause analysis to constitutional challenges. If the certiorari sought in the Petition in this case were to be granted, this Court's review would focus on the application of well-settled principles of law. Accordingly, the petitioner's acknowledgment of "well-established precedent," on the face of its Petition, serves as a clear affirmation that there is no compelling reason for the writ to be allowed.

II.

THE SUPREME COURT HAS SUGGESTED REPEATEDLY THAT THE INTERESTS OF STATE OR FEDERAL COURT BARS, IN ASSURING THE COMPETENCE OF THEIR ATTORNEYS, MAY BE ADDRESSED BY REQUIRING MANDATORY ATTENDANCE AT SEMINARS ON LEGAL PRACTICE AND PROCEDURE.

In three separate decisions, rendered over the past twelve years, this Court has suggested that, by requiring

mandatory attendance at seminars or lectures on legal practice, state and federal court bars may constitutionally address their interests in assuring the competence of their members. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Frazier v. Heebe*, 482 U.S. 641 (1987). Each of these decisions was recognized by the Third Circuit Court of Appeals in its opinion in this case which upheld the mandatory attendance rule for the skills and methods course. *Tolchin v. Supreme Court of New Jersey*, 111 F.3d at 1110 n.5.

The Petition unpersuasively contends that the reliance placed on these decisions below "is a perversion of what this Court appears to have intended. . . . " [P-18]. The petitioner, however, never explains why New Jersey's mandatory attendance requirement for the skills and methods course is unlike the seminar attendance requirements which were suggested in the foregoing cases. Since the attendance rule imposed on skill and methods course registrants in New Jersey is in complete accord with the suggestions of the Supreme Court, the Petition has not set forth a compelling reason for a grant of certiorari on this ground.

In undertaking its Commerce Clause analysis, under the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. at 142, the Third Circuit necessarily considered whether "the mandatory attendance requirement for the skills and methods course is rationally related to the benefits it is intended to promote." *Tolchin v. Supreme Court of New Jersey*, 111 F.3d at 1110. [Pa-23]. This search

for a rational relationship, under Commerce Clause analysis, is similar to the test applied to constitutional challenges under the Privileges and Immunities Clause where the Court must consider whether the alleged discrimination "bears a close or substantial relationship to the State's objective." *Supreme Court of New Hampshire v. Piper*, 470 U.S. at 284.

In deciding whether New Hampshire's state residency requirements for admission to the bar impinged upon privileges and immunities protections in *Piper*, the Court considered the rationale, proffered by the Supreme Court of New Hampshire, that nonresident attorneys "would be less likely . . . to become, and remain, familiar with local rules and procedures. . . . " 470 U.S. at 285. This Court rejected this reason and held that the New Hampshire residency requirement did not bear a substantial relationship to it. *Id.* n.19. It pertinently added, however, that a "less restrictive alternative" by which New Hampshire could assure that nonresident members of its bar were familiar with local rules and procedures "would be to require mandatory attendance at periodic seminars on state practice." *Id.* n.19.

Three years later, this Court repeated its approval of mandatory attendance requirements in the context of another Privileges and Immunities Clause case. In *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988), a permanent residency requirement for those admitted to the Virginia bar "on motion" was challenged. *Id.* at 61. In determining that Virginia had not established a substantial reason for this rule, based on its concern that nonresident attorneys would not keep abreast of legal

developments, this Court noted that the state could protect its interests through other means that did not infringe constitutional protections. *Id.* at 69. While it was emphasized that the Supreme Court "is not well positioned to dictate specific legislative choices to the State," it noted that such alternatives existed and included the Supreme Court of Virginia "requir[ing] mandatory attendance at periodic continuing legal education courses." *Id.* (citing *Supreme Court of New Hampshire v. Piper*, 470 U.S. at 285 n.19).

This Court's approval of mandatory attorney attendance at periodic seminars has not been limited to the aforecited privileges and immunities cases. In *Frazier v. Heebe*, 482 U.S. 641 (1987), a bar membership rule of the United States District Court for the Eastern District of Louisiana was held invalid under the Court's inherent supervisory powers. That rule, which required that all applicants for general admission to its bar either reside or maintain an office in the State of Louisiana, was found to be unnecessary. *Id.* at 646. In so holding, this Court pertinently added that "other more effective means of ensuring the competence of bar members are available to the district courts. . . . " *Id.* at 648. Expressly mentioned as one of these "more effective means" were "seminar attendance requirements." *Id.*

Each of the aforecited cases plainly evinces this Court's approval of mandatory attendance at seminars as a proper means to provide bar members with continuing legal education on practice and procedure. Although in neither *Piper*, *Friedman* nor *Frazier* did the Supreme Court expressly indicate where the seminars, which it suggested, should be offered, there is absolutely nothing in

these decisions which would lead one to conclude that attendance could not be required within the state or federal jurisdiction served by the bar at issue. In light of this Court's prior approval of the very means chosen by the New Jersey Supreme Court to assure that newly admitted New Jersey attorneys are aware of local practice and procedure, there is no reason to grant certiorari to review the mandatory skills and methods course attendance rule which has been challenged by the petitioner in this case.

CONCLUSION

This case does not present any question warranting review by the United States Supreme Court. Accordingly, it is submitted that the Petition for a Writ of Certiorari to the Third Circuit Appeals, filed by Robert J. Tolchin, should be denied.

Respectfully,

WILLIAM B. MCGUIRE
TOMPKINS, MCGUIRE & WACHENFELD
Counsel of Record
for Respondents
New Jersey Institute for
Continuing Legal Education and
Joseph J. Hogya

MARIANNE M. DEMARCO
On the Brief

APPENDIX

Exhibit A To The Complaint Filed With The United States District Court For The District Of New Jersey On October 12, 1994

[LOGO] **ICLE:**
Advancing the Profession

FALL
1994

Skills and
Methods Course

Administered for
The New Jersey Supreme Court
by the
New Jersey Institute
for Continuing Legal Education

One Constitution Square,
New Brunswick, NJ 08901 (908) 214-8500

Course Overview

Since 1962, the Skills and Methods Course, a nationally renowned "bridge the gap" program, has helped prepare thousands of attorneys for the transition from either law school to practice, or practice in other states to practice in New Jersey.

The course consists of two components, each of which must be completed within certain time frames. The first component is a series of "core courses" which cover the basics of five subject areas most lawyers need to know. The second component consists of two phases of "continuing education courses" that expand your knowledge of New Jersey practice.

Taught by distinguished New Jersey judges, experienced practitioners and related experts, both the "core courses" and the "continuing education courses" provide insight on the latest trends and techniques in the areas covered.

CORE COMPONENT

The first component of the Skills and Methods Course is a series of five "core courses," all targeted to New Jersey practice, including:

- Family Law
- Real Estate
- Will Drafting and Probate Practice
- Professional Responsibility

and (Choose one)

- Civil Trial Preparation

or

- Criminal Trial Preparation

TIME FRAME AND FORMAT

The complete series of "core courses" is offered four times each year (spring, summer, fall and winter cycles) in regional locations throughout the state. The cycles are offered in several different formats – weekdays, evenings, and Saturdays – for your convenience. You can choose the format, location, and time schedule that best suits your needs, but you must complete the series of "core courses" within two cycles after you are sworn in. Or, you may take the series of "core courses" before being sworn in,

even as early as your final semester of law school, if you submit a letter of good standing from your Academic Dean.

PRACTICE EXERCISES

Each of the five "core courses" includes the preparation of a written exercise that is designed to simulate the types of matters new lawyers would be asked to handle by a client (e.g., a real estate closing, a will, a complaint, etc.). Exercises must be completed and submitted by assigned dates, and you must receive passing grades on all five exercises in order to complete this requirement. If you receive a failure or an incomplete grade on an exercise, you may be required to complete a makeup exercise and re-register for that lecture in a subsequent cycle.

FEES

There is a $275 registration fee for the core component which includes tuition for the five core courses, and a complete library of 17 practice handbooks that also cover the continuing education course topics.

TIME FRAME

SWORN IN	CYCLE *Must Complete:*
December	Winter *or* Spring Cycle
June	Summer *or* Fall Cycle

CYCLES

CYCLE	MONTHS OFFERED	FORMAT
Spring	April/May	Two weekday evenings per week for five weeks
Summer	August	Five full day programs on consecutive weekdays (presented on videotape)
Fall	Sept./Oct.	Two weekday evenings per week for five weeks
Winter	Jan./Feb.	Five full day programs on consecutive Saturdays

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CONTINUING EDUCATION COMPONENT

After you complete the "core courses", you advance to the continuing education component, which is broken down into two phases of two courses during each phase. In the first phase, you must take Administrative Law, and either Civil or Criminal Trial Preparation, whichever was not selected as a core course. In the second phase, you can choose any two courses from the list of programs noted on the chart below. The courses offered as part of the continuing education component are presented live twice each year in North, Central and South Jersey locations, and are also presented as video replays at various other times during the year.

Dates, times and full descriptions of each course are featured in the ICLE Newsletter, which you will receive on a regular basis once you register for core courses. You also will receive periodic mailings reminding you of your requirements. Tuition for each continuing education

course is $25 in advance or $75 at the door. There are no practice exercises for these course and materials are included within the library of 17 practice handbooks you receive prior to taking the core courses.

PHASE I

Phase I of the Continuing Education Component includes:

- ✓ Administrative Law
- ✓ *and either* Civil *or* Criminal Trial Preparation (whichever seminar was not selected as a core course.)

You must complete Phase I of the Continuing Education Component within the year beginning one year after you successfully sat for the bar exam. For example, if you successfully sat for the bar exam in February 1994, you must complete both courses in Phase I within the year beginning February 1995 (and not later than January 1996). If your schedule allows, you can complete these courses earlier than the required time frame.

PHASE II

During Phase II of the Continuing Education Component, you may select any two courses from the following:

1. Purchase, Organization and Sale of a Small Business
2. Bankruptcy Practice
3. Collection Practice
4. Municipal Court Practice
5. Workers' Compensation Practice
6. Landlord/Tenant Practice

You must complete Phase II of the Continuing Education Component within the year beginning two years after you successfully sat for the bar exam. For example, if you successfully sat for the bar exam in February 1994, you must complete both courses in Phase II within the year beginning February 1996 (and not later than January 1997). Again, you can always complete these courses earlier than outlined above if your schedule permits.

Staying Informed

You will be notified by letter after you successfully complete each phase of the Skills and Methods requirement. Again, attendance at core courses and continuing education courses is mandated by the New Jersey Supreme Court, and you must complete all phases within the stated time frames to remain eligible to practice law in New Jersey. No waivers are granted based on prior experience in another jurisdiction or experience gained in a law school clinical program or clerkship.

In addition to the Skills and Methods Course, ICLE offers nearly 300 other seminars each year that can assist you as you advance in the profession. Throughout your career, you can turn to ICLE as your primary resource for staying current with New Jersey law and you can take advantage of the wide range of books, cassettes, and software products designed to improve your practice.

ICLE is a nonprofit, self-supporting joint venture of the New Jersey State Bar Association, Rutgers – The State University of New Jersey, and Seton Hall University.

REGISTER EARLY

To guarantee your seat in the format and cycle that best suits your needs, please register early. Registrations are processed on a "first come – first served" basis. Don't risk being closed out of your preferred location. Registration and tuition for the Fall 1994 cycle must be received by August 8, 1994. Registrations received after that date are subject to a $50 late fee, and can only be accepted if space is still available.

Remember to check off the location where you prefer to attend, and mail the application along with credit card information or a check for the full tuition to: Skills and Methods Course Director, ICLE, One Constitution Square, New Brunswick, NJ 08901-1500.

What You'll Receive

■ Confirmation letter with your Skills ID#. Please retain this letter for future reference and include your Skills ID# on all correspondence and exercises. There are often many registrants with the same or similar names. The Skills ID# helps to ensure that you will receive proper credit.

■ Library of 17 practice handbooks, lecture material, practice exercises and forms. These items will be shipped via UPS. Please indicate a preferred shipping address where someone will be present to sign for receipt of the package. Do not use P.O. Box numbers. If you register before the deadline, you can expect to receive your materials approximately two weeks before the first scheduled lecture.

■ Map with directions to course location.

APPLICATION FORM

NAME
LAST FIRST MIDDLE INITIAL

PREFERRED SHIPPING ADDRESS FOR MATERIALS:
____ Home ____ Business

NOTE: Do not use P.O. Box numbers in any address. ICLE ships via UPS. Someone must be present at the address to sign a receipt for materials.

HOME ADDRESS
NUMBER AND STREET APT. NO.

CITY STATE ZIP CODE

AREA CODE PHONE

BUSINESS ADDRESS
LAW FIRM OR COMPANY NAME

NUMBER AND STREET SUITE NO.

CITY STATE ZIP CODE

AREA CODE PHONE AREA CODE FAX

LAW SCHOOL

YEAR GRADUATED

NOTE: FINAL SEMESTER LAW STUDENTS MUST OBTAIN AND SUBMIT CERTIFICATION OF GOOD STANDING FROM LAW SCHOOL DEAN OF STUDENTS IN ORDER TO TAKE SKILLS AND METHODS COURSE.

SOCIAL SECURITY NUMBER

_____

GENDER:___ MALE ___ FEMALE

CHECK BOX WHERE APPLICABLE:

NEW REGISTRANTS:

___ I enclose my full $275.00 tuition.

___ If registering after 8/8/94, I enclose $325 which includes $50.00 late fee.

RE-REGISTRANTS:

___ I enclose my full $75.00 re-registration fee.

___ If registering after 8/8/94, I enclose $125 which includes $50.00 late fee.

EITHER: *(Choose One Trial Course)*

___ Civil Trial Preparation *or*

___ Criminal Trial Preparation

PREFERRED LOCATION:

___ Hanover Marriott, Whippany SSNORTH – 576

___ Hilton Gateway, Newark SSNORTH – 583

___ NJ Law Center, New Brunswick SSCENTRAL – 59

___ Sheraton Inn, Cherry Hill SSSOUTH – 597

Month/Year

___ I successfully sat for the NJ Bar Examination in _____

___ I was admitted to the NJ Bar in _____

PAYMENT BY CHECK:
___ FIRM ___ PERSONAL
(Make all checks payable to NJ ICLE)

PAYMENT BY CREDIT CARD:
___ VISA ___ MASTERCARD ___ AMEX

ACCOUNT NUMBER
_____

EXPIRATION DATE _____ TODAY'S DATE _____

NAME ON CARD _____

SIGNATURE _____

_____

ICLE OFFICE USE ONLY
AMOUNT PAID $ _____ CHECK # _____
DATE RECEIVED _____ ID#_____

_____

From the Skills and Methods Course Director

[LOGO]

NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION

The non-profit, continuing education service of the
NEW JERSEY STATE BAR ASSOCIATION
SETON HALL UNIVERSITY
RUTGERS-THE STATE UNIVERSITY OF NEW JERSEY

Dear New or Prospective Attorney:

Congratulations on your decision to practice law in New Jersey.

The law is a dynamic and exciting field – one that calls for constant learning and professional development. That is why ICLE, the Institute for Continuing Legal Education, is ready to provide you with the advanced training and information you need to effectively practice law in New Jersey. For more than 30 years, ICLE has served the New Jersey bench and bar by offering a wide range of seminars, books, audiocassettes, videotapes, and computer software designed to advance the profession. ICLE also administers the Skills and Methods Course on behalf of the New Jersey Supreme Court. The Skills and Methods Course is a nationally renowned "bridge the gap" program that has helped prepare thousands of New Jersey attorneys for the transition for either law school to practice or practice in other states to practice in New Jersey.

Because New Jersey is committed to the highest standards of legal professionalism, every attorney must complete all portions of the Skills and Methods Course in addition to passing the bar examination and satisfying character and fitness requirements to be eligible to practice law in New Jersey. The Skills and Methods Course supplements your formal education or previous experience in another state through a series of practical seminars, written exercises and comprehensive handbooks that are designed to teach you the local nuances of New Jersey practice so you can get up to speed quickly and avoid costly mistakes.

The Skills and Methods Course is required for all attorneys beginning to practice in New Jersey, so I encourage you to register early to get the time frame and course format you prefer. As explained in this application, you don't need to wait until you receive your bar exam results to register for the course.

We look forward to helping you fulfill your mandatory Skills and Methods requirement and to serving as your partner in practice throughout your legal career.

Congratulations and continued success.

Sincerely,
Joseph J. Hogya, Esq.
Skills and Methods
Course Director

A COMPLETE LIBRARY

Upon registering for the core component, you will receive a comprehensive library of 17 practice handbooks. In addition to using these books at required classes, you also can use the complete set to resolve many problems commonly experienced in the first few years of practice. They contain forms and checklists that experienced practitioners regularly use. You'll also receive an Exercise Materials packet with five practice exercises for core courses, along with note-taking outlines and commonly used legal forms.

Your library:

- Real Estate Closing Procedures
- Basic Estate Planning

- Civil Trial Preparation
- Try-It Again
- Workers' Compensation
- Bankruptcy
- Municipal Land Use
- Organization and Sale of Small Businesses
- Professional Responsibility in New Jersey
- Trust and Business Accounting for Attorneys
- Family Law
- Basic Estate Administration
- Criminal Trial Preparation
- Tenant/Landlord Practice
- Collection Practice
- Municipal Court
- Administrative Law

The items delivered will be the most current editions available at the time of shipment. To keep your library current, you may wish to purchase updated editions as they become available. Check the ICLE Catalog for information on new and updated publications.

Tentative Fall 1994 Course Schedule

The Fall 1994 cycle consists of lectures presented on two weekday evenings per week for five weeks. All lectures meet from 6 p.m. to 10 p.m. Please plan to arrive early so that you can register and be seated before the program begins.

COURSE	DATE
Family Law	Sept. 12 & 13
Real Estate	Oct. 3 & 4
Will Drafting/Probate Practice	Oct. 10 & 11
Professional Responsibility	Oct. 17 & 18
Civil Trial or Criminal Trial Preparation	Oct. 24 & 25

Refunds

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No. 97-209

In The

Supreme Court of the United States

October Term, 1996

ROBERT J. TOLCHIN, individually and on behalf of all others similarly situated,

Petitioner,

v.

THE SUPREME COURT OF THE STATE OF NEW JERSEY, ROBERT WILENTZ (intended to be the Chief Judge of the Supreme Court of New Jersey), STEPHEN W. TOWNSEND (intended to be the Clerk of the Supreme Court of New Jersey), THE NEW JERSEY STATE BOARD OF BAR EXAMINERS, SAMUEL J. UBERMAN (intended to be the Assistant Secretary of the New Jersey Supreme Court who plaintiff believes to direct the State Board of Bar Examiners), THE NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION, and JOSEPH J. HOGYA (intended to be the Institute for Continuing Legal Education Skills Training Course Director),

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE PHILADELPHIA BAR ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE PHILADELPHIA BAR ASSOCIATION IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the rules of this Court, the Philadelphia Bar Association respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petitioner. The petitioner and respondents Supreme Court of New Jersey, Chief Justice Deborah T. Portiz, Stephen W. Townsend, New Jersey Board of Bar Examiners, and Samuel J. Uberman have consented to the filing of this brief. Respondents the New Jersey Institute for Continuing Legal Education and Joseph J. Hogya have not provided consent.

The Philadelphia Bar Association is the oldest chartered metropolitan bar association in the United States. Founded in 1802 by fewer than one hundred lawyers to create and maintain a law library for the city's legal community, the Association's membership now exceeds twelve thousand and its activities on behalf of Philadelphia lawyers are wide-ranging.

Throughout its long history, the Association has been deeply concerned about issues involving the practice of law and access to justice. In view of the geographical proximity of Philadelphia to New Jersey, a substantial portion of the Association's members has taken and passed the New Jersey bar exam, fulfilled the New Jersey legal education requirements, and is admitted to practice in New Jersey.

Yet, despite the geographical proximity and despite the fact that the Association's lawyers who are admitted in New Jersey are otherwise fully qualified to practice in

their sister state, the New Jersey rules preclude them from doing so unless they also have a *bona fide* office in New Jersey. There is no reciprocal measure in Pennsylvania – New Jersey lawyers who are admitted to the Pennsylvania bar and who have satisfied the Pennsylvania legal education requirements are free to practice in the courts of Pennsylvania, regardless of where their office is located.

The Association is deeply concerned about the economic, practical, and ethical constraints that the New Jersey *bona fide* office rule imposes on its members and on their ability to represent their clients. It is concerned that the *bona fide* office rule, while perhaps serving the purpose of protecting New Jersey economic interests, is severely burdening the free flow of commerce between Pennsylvania and New Jersey. And, because the Association's members in downtown Philadelphia are but a few miles and a fifteen-minute car or train ride from New Jersey, the Association is concerned that, despite recognizing that "it may be true . . . that the *bona fide* office requirement may include an element of economic protectionism," *Tolchin v. Supreme Court of the State of New Jersey*, 111 F.3d 1099 (3d Cir. 1997) (39a),[1] the Court of Appeals for the Third Circuit upheld the constitutionality of the *bona fide* office rule on so slender a reed as "attorney accessibility for clients, counsel and parties." *Id.* (21a).

In view of its abiding concern with the effect of the New Jersey *bona fide* office rule on its members, the

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[1] Citations are to the Appendix to the Petition for a Writ of Certiorari filed by Robert J. Tolchin.

Philadelphia Bar Association respectfully requests that it be allowed to participate in this case and to file the attached brief *amicus curiae* in support of petitioner.

Respectfully submitted,

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Dated: October 3, 1997.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The interest of *amicus curiae* the Philadelphia Bar Association is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

In four cases decided in the 1980s, this Court established certain important guidelines with respect to state regulation of lawyers. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (New Hampshire residency requirement restricting state bar admission to New Hampshire residents is unconstitutional); *Frazier v. Heebe*, 482 U.S. 641 (1987) (invalidating local rule of the United States District Court for the Eastern District of Louisiana requiring lawyers who do not reside in the state to maintain an office in the state); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (Virginia rule permitting Virginia residents who are licensed to practice law in another state to be admitted to the Virginia bar solely on motion, while requiring nonresidents to take the Virginia bar exam, is unconstitutional); *Barnard v. Thorstenn*, 489 U.S. 546 (1989) (local rule of District Court of the Virgin Islands requiring that before an otherwise qualified attorney can be admitted to the Virgin Islands bar, the attorney must establish that s/he resides and intends to

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief.

continue to reside in the Virgin Islands is unconstitutional).

This case presents an opportunity for this Court to resolve an important question involving the state regulation of lawyers left open by its prior decisions – whether a state can require otherwise-qualified lawyers to maintain an office in the state in order to practice there.[2] In his concurring opinion in *Piper*, Justice White stated, "I would postpone to another day such questions as whether the State may constitutionally condition membership in the New Hampshire Bar upon maintaining an office for the practice of law in the State of New Hampshire." 470 U.S. at 289 (White, J., concurring). With this case, that day has come.

The New Jersey *bona fide* office rule prohibits any lawyer from practicing law in New Jersey unless, in addition to passing the bar examination and meeting all other requirements, the lawyer maintains a *"bona fide"* office within the state. *See* N.J.Ct.R. 1:21(a).[3] The rule has

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[2] In his petition for a writ of *certiorari*, petitioner presents the issues of the constitutionality of both the New Jersey continuing legal education requirement and the *bona fide* office requirement. *Amicus curiae* the Philadelphia Bar Association limits its brief to the *bona fide* office issue.

[3] The New Jersey *bona fide* office rule provides, in relevant part:

> [N]o person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State . . . and maintains a *bona fide* office for the practice of law in this State regardless of where the attorney is domiciled. A *bona fide* office is more than a maildrop, a summer home that is

been described as designed to "stop lawyers from Philadelphia and New York dead in their tracks as they seek to break into the New Jersey market without incurring major operating costs. And [the rule] is certainly needed to protect lawyers who regularly practice in the State, said New Jersey State Bar Association President Cynthia M. Jacob." *Rule Changes on the Money: Lawyer Office Regs Stiffened,* N.J. Lawyer, Aug. 5, 1996, at 1.

The Court of Appeals for the Third Circuit upheld the constitutionality of the *bona fide* office rule on the sole ground that the rule "has a rational relationship to the benefit of attorney accessibility for clients, courts, counsel and parties." *Tolchin,* 111 F.3d 1099 (21a). In view of the fact that the vast majority of Philadelphia lawyers maintain their principal office only one or two miles from the courts in southern New Jersey in which they practice, whereas lawyers in the northern part of the state practice some 80 miles from those same southern New Jersey

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> unattended during a substantial portion of the year, an answering service unrelated to a place where business is conducted or a place where an on-site agent of the attorney receives and transmits messages only. For the purpose of this section, a *bona fide* office is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time.

N.J.Ct.R. 1:21-1(a)(1996) (80a-85a).

courts, the rule cannot be justified on accessibility grounds.

Indeed, the geography is such that many Philadelphia lawyers are *more* accessible to their New Jersey clients and to New Jersey courts than numerous New Jersey lawyers are. In reality, the rule targets Philadelphia (and New York) lawyers who – at least from the perspective of the New Jersey economic interests the rule seeks to protect – are perhaps all too accessible to New Jersey.

The *bona fide* office rule has one purpose and one effect: to prevent Philadelphia and New York lawyers from competing with New Jersey lawyers. *Certiorari* is warranted because of the fundamental effect such an in-state office requirement has on the practice of law, and because the Third Circuit's decision upholding the rule is flatly inconsistent with this Court's dormant Commerce Clause jurisprudence.[4]

---

[4] This *bona fide* office rule also raises significant issues under the Privileges and Immunities Clause. While the rule ostensibly places the same burden upon residents and nonresidents of New Jersey (both groups are required to maintain a *bona fide* office in the state), because "the overwhelming majority of attorneys have their principal office in the state where they live," *In re Sackman*, 448 A.2d 1014, 1020 (N.J. 1982), the rule disproportionally discriminates against nonresidents. Although petitioner's questions presented may be broad enough to include the Privileges and Immunities Clause issue, in his brief he focuses on the dormant Commerce Clause issue. Accordingly, *amicus curiae* the Philadelphia Bar Association will do the same.

ARGUMENT

THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S CLEAR AND LONG-STANDING DORMANT COMMERCE CLAUSE JURISPRUDENCE.

The Commerce Clause contains "an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce." *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652 (1981). In analyzing state economic regulation under this "negative" or "dormant" aspect of the Commerce Clause, this Court has developed a two-tiered approach. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986). "When a statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [this Court has] generally struck down the statute without further inquiry." *Brown-Forman*, 476 U.S. at 579 (citing *Philadelphia v. New Jersey*, 437 U.S. 617 (1978)). When, however, "a statute has only indirect effects on interstate commerce and regulates evenhandedly, [this Court has] examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

The Court of Appeals' holdings – that the *bona fide* office rule: (1) does not favor in-state economic interests over out-of-state interests and so is not subject to heightened review; and (2) is justified under the less stringent Commerce Clause balancing test on the sole ground of

attorney accessibility – are flatly inconsistent with this Court's jurisprudence.

A. New Jersey's *Bona Fide* Office Rule Is *Per Se* Invalid Because Its Effect Is To Favor In-State Economic Interests Over Out-Of-State Economic Interests.

The Third Circuit rejected petitioner's argument that the *bona fide* office rule directly discriminates against out-of-state interests and so should be subject to heightened scrutiny under the Commerce Clause. According to the Court of Appeals, "it is reasonable to assume that the only attorneys actually burdened by this requirement are those who wish to maintain a small or sporadic practice in New Jersey [and] such attorneys may be New Jersey residents as well as nonresidents." *Tolchin*, 111 F.3d 1099 (16-17a). This conclusion, however, misconstrues the relevant Commerce Clause analysis.

While the rule's effect on resident and nonresident individuals is clearly an important element in a challenge under the Privileges and Immunities Clause, the relevant inquiry under the dormant Commerce Clause pertains to in-state and out-of-state *economic interests*, not residence. *See Brown-Forman*, 476 U.S. at 579. Even assuming *arguendo* that the *bona fide* office rule imposes burdens on resident and nonresident individuals evenhandedly (which it does not), it is not evenhanded with regard to in-state and out-of-state economic interests.

For purposes of the dormant Commerce Clause, law firms based in New Jersey constitute in-state interests, while firms based in Philadelphia or other nearby markets are out-of-state economic interests, regardless of

where the individual lawyers who comprise the firms reside. The *bona fide* office requirement thus imposes no burden on in-state economic interests, because New Jersey-based law firms, by definition, satisfy the office requirement.[5]

On the other hand, out-of-state interests, such as Philadelphia-based law firms that frequently represent clients in southern New Jersey, are saddled with the rather extraordinary burden of having to maintain a second office. Many firms are unable to bear the considerable costs of operating a "*bona fide* office" in New Jersey; small firms and solo practitioners are challenged simply to staff both offices; and even those firms that can afford a New Jersey office may have no reason or need to establish one. Moreover, because the vast majority of a Philadelphia firm's New Jersey litigation practice occurs in courthouses just a few miles from its Philadelphia office, New Jersey's office requirement imposes an expense that yields no benefit to counsel, clients or courts. Yet, without a New Jersey office, these firms are forced to refer their New Jersey cases to New Jersey firms – even when the client is located in Philadelphia and chooses to be represented by a Philadelphia lawyer, and even when the matter does not involve litigation.

Consider, for example, the effect of the rule on a lawyer who handled a single, non-litigation matter in

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[5] A lawyer whose office is in his or her home will satisfy the *bona fide* office rule as long as the office is a "functioning office" that meets the requirements of the rule. *See Tolchin*, 111 F.3d 1099 (17a).

New Jersey. The New Jersey Law Journal reports the following:

> When Daniel Herron died on July 13, 1992, leaving an estate in excess of $200,000, George Guyer Young, Jr., of Havertown, [Pennsylvania], the executor, hired his son, attorney George Guyer Young, III, to administer the estate
>
> The junior Young is admitted in New Jersey but has no office in the state, and did all the necessary work to distribute the proceeds of the estate to the 16 heirs, six of whom live in New Jersey.
>
> The lawyer received $16,000 and there is no record that anyone was unhappy with his work except one heir, a niece, Catherine McCorriston of Gloucester City, [New Jersey].
>
> She thought the fee was rather high and she also wasn't happy with the burial plans. Her uncle wanted to be buried in one cemetery, she said during an ethics hearing, and he ended up in another one.
>
> In the correspondence over these issues with Youngs, McCorriston noticed from a letterhead that the lawyer had no office in New Jersey so she filed a grievance and the District IV Ethics Committee followed with a complaint accusing Young of practicing without a bona fide office.

Does One Case Require a Bona Fide Office?, N.J.L.J., Nov. 20, 1995, at 13. After a hearing, the New Jersey Supreme Court ruled on the case, admonishing the attorney for practicing law in New Jersey without an office and imposing court costs. *See In re Young*, 675 A.2d 1117 (N.J. 1996).

The Third Circuit's decision cannot be reconciled with this Court's opinion in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The Arizona statute challenged in *Pike* required all Arizona-grown fruit to be packaged and labeled before being shipped outside the state. A fruit producer objected to enforcement of the statute on the ground that the producer already maintained a California packing facility located just thirty-one miles away from its Arizona harvesting site. The producer argued that the statute imposed an unreasonable burden on interstate commerce because it required the company to build an expensive and unnecessary packing facility within Arizona.

This Court held that Arizona's interest in having the fruit identified as originating in Arizona could not constitutionally justify the requirement that the company build and operate an unneeded $200,000 packing plant in Arizona. *See* 397 U.S. at 145. Emphasizing that the statute may constitute an invalid restraint on commerce with respect to a particular company, even if it "does not impose such rigidity on an entire industry," 397 U.S. at 146, the Court concluded that:

> The nature of that burden is, constitutionally, more significant than its extent. For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.

397 U.S. at 145 (citations omitted).

New Jersey's *bona fide* office requirement imposes upon interstate commerce precisely the same burdens that were declared "virtually *per se* illegal" in *Pike*. Philadelphia firms that wish to practice law in New Jersey, like the fruit producers in *Pike*, are forced to open and maintain expensive and unneeded offices in New Jersey, even though such offices merely duplicate existing facilities located just a few miles away and even though the law firm's work could "more efficiently be performed" in the firm's Philadelphia office.

Moreover, in determining the extent of the burden placed upon interstate commerce, "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989), *cited in Wyoming v. Oklahoma*, 502 U.S. 437, 453-54 (1992). Consider, in this respect, the draconian effect on interstate commerce that would occur if Maryland, Washington, D.C., and Virginia each had *bona fide* office rules like New Jersey's.

In sum, New Jersey's requirement that all lawyers maintain a *bona fide* office within the state subjects out-of-state economic interests to onerous, yet unnecessary, burdens, while imposing no burdens upon in-state interests. The principal effect of this requirement, and its principal purpose, is to favor New Jersey law firms by increasing the costs and inconveniences to Philadelphia (and New York) firms who wish to represent clients in New Jersey.

Thus, even assuming *arguendo* that the *bona fide* office rule is facially neutral with regard to resident and nonresident individuals, the rule is patently discriminatory with respect to out-of-state economic interests, and is therefore *per se* invalid under the dormant Commerce Clause.

B. Even If New Jersey's *Bona Fide* Office Rule Does Not Trigger Heightened Scrutiny Under The Commerce Clause, The Rule Is Nonetheless Invalid Under The Commerce Clause Balancing Test.

Even if the *bona fide* office rule were not virtually *per se* invalid under the dormant Commerce Clause, it does not pass constitutional muster under this Court's less stringent dormant Commerce Clause test. "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). The burden the *bona fide* office rule imposes on interstate commerce has been discussed above. As will be demonstrated, that burden far exceeds any possible benefit to New Jersey.

Although in the courts below, the Supreme Court of New Jersey defended the rule as promoting lawyer competence, accountability, and accessibility, the Court of Appeals rejected the first two justifications. With respect to competence, the Court of Appeals, relying on this Court's decisions in *Frazier, Barnard,* and *Piper,* concluded

that, "[t]he Appellees have put forth no credible arguments as to why the *bona fide* office requirement would make an attorney more competent." *Tolchin*, 111 F.3d 1099 (20a). With respect to accountability, the Court of Appeals determined that, "[t]he Appellees [made] no compelling argument as to how New Jersey's *bona fide* office requirement is rationally related to attorney accountability." *Id.* (21a). The Third Circuit's holdings with respect to competence and accountability are fully consistent with this Court's precedent. *See Frazier v. Heebe*, 482 U.S. 641, 649 (1987) ("[T]he mere fact that an attorney has an office in [a jurisdiction] surely does not warrant the assumption that he or she is more competent than an out-of-state member of the state bar."); *see also Barnard v. Thorstenn*, 489 U.S. 546, 555 (1989); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 (1985).

However, in considering the third justification offered for the rule – accessibility – the Court of Appeals disregarded this Court's precedent and upheld the *bona fide* office rule on the sole ground that there exists a "rational relationship between the *bona fide* office requirement and the intended benefit of attorney accessibility." *Tolchin*, 111 F.3d 1099 (21a). The Court of Appeals' holding is clearly at odds with this Court's determination that residency and in-state office requirements are "unnecessary and irrational" methods for ensuring attorney accessibility. *See, e.g., Frazier v. Heebe*, 482 U.S. 641, 646 (1987). Indeed, this Court has long recognized that there is no link between being located within a state and accessibility. *See Piper*, 470 U.S. at 286-87; *Frazier*, 482 U.S. at 650; *Thorstenn*, 489 U.S. at 554.

In *Piper*, for example, a Vermont resident who had passed the New Hampshire bar examination challenged New Hampshire's rule limiting bar membership to New Hampshire residents. New Hampshire sought to defend the rule as a means for ensuring attorney accessibility. Because the residency rule discriminated on its face against nonresidents, the Court in *Piper* assessed the rule's validity under the Privileges and Immunities Clause, not the dormant Commerce Clause. However, *Piper*'s reasoning is wholly applicable here.

This Court rejected the accessibility rationale, reasoning that, "[o]ne may assume that a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues will reside in places reasonably convenient to New Hampshire." 470 U.S. at 286-87. Similarly, most lawyers will maintain their offices in reasonably convenient locations. That is, accessibility has little to do with the state in which a lawyer's home or office is located, because most lawyers will live and maintain their offices in places convenient to their clients and, if they are litigators, to the courts in which they practice. As *Piper* makes clear, a lawyer's accessibility to clients or to the courthouse is mostly a function of distance; the state borders that a lawyer may or may not cross en route to his or her destination are irrelevant to the lawyer's accessibility.

That is precisely why this Court in *Frazier* exercised its supervisory powers over the district courts to invalidate as "unnecessary and irrational" an Eastern District of Louisiana district court in-state office requirement, holding that the office requirement, like a residency requirement, was unjustified because "there is no link

between residency within a State and proximity to a courthouse." 482 U.S. at 650. Because, like New Jersey's rule, the Louisiana rule required "only that the attorney have an office somewhere in the State, regardless of how far that office is from the courthouse," it could not be justified on accessibility grounds. 482 U.S. at 650.

The court in *Frazier* also noted that "modern communications systems, including conference telephone arrangements, make it possible to minimize the problem of unavailability." 482 U.S. at 649. Today, a decade later, telecommunications technology is far more advanced than it was when *Frazier* was decided. Lawyers now are routinely accessible by cellular telephones, computer modems, facsimile machines, and electronic beepers. If an in-state office requirement was both "unnecessary and irrational" in 1987, then New Jersey's office requirement cannot possibly be justified on accessibility grounds today. *See Frazier*, 482 U.S. at 646.

Indeed, since *Piper* was decided in 1985, this Court consistently has rejected "accessibility" as a sufficient justification for such sweeping restrictions on the ability of lawyers to practice law in states in which they have been admitted to practice. Even the Virgin Islands' unique geographic isolation and accessibility concerns, together with its irregular airline and telephone service, were insufficient to justify its residency requirement. *See Barnard*, 489 U.S. 546, 554 (1989).

As a result of Philadelphia's proximity to New Jersey and recent advances in widely-used telecommunications technology, New Jersey's *bona fide* office requirement is not even plausibly justified by the state's interest in

ensuring attorney accessibility. To the contrary, Philadelphia (and New York) lawyers are completely accessible to New Jersey – more accessible, in fact, than many of their in-state colleagues are to clients and courts in other parts of the state. For these reasons, the *bona fide* office rule is invalid even under the more deferential dormant Commerce Clause balancing test.

CONCLUSION

Like the residency cases that this Court decided in the 1980s, this case is an important case involving state regulation of lawyers and the practice of law. The New Jersey *bona fide* office rule impermissibly restricts the practice of law, while providing no true benefit to New Jersey. *Amicus curiae* the Philadelphia Bar Association respectfully requests that this Court grant the petition for a writ of *certiorari*.

Respectfully submitted,

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Dated: October 3, 1997.

No. 97-209

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In the
Supreme Court of the United States
October Term, 1997

ROBERT J. TOLCHIN, individually and on behalf of all others similarly situated,

Petitioner,

v.

THE SUPREME COURT OF THE STATE OF NEW JERSEY, *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For the Third Circuit

BRIEF OF RESPONDENTS SUPREME COURT OF NEW JERSEY, ROBERT WILENTZ, STEPHEN W. TOWNSEND, THE NEW JERSEY STATE BOARD OF BAR EXAMINERS, AND SAMUEL J. UBERMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED

1. Whether the Third Circuit properly applied the balancing test found in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), in finding that the New Jersey Supreme Court's standards for the practice of law in its jurisdiction do not violate the dormant aspect of the Commerce Clause, to the extent that they require all attorneys who wish to practice in New Jersey to maintain a bona fide office in that state, regardless of domicile.

2. Whether the Third Circuit properly concluded that the standards established by the New Jersey Supreme Court for the practice of law in that jurisdiction violate the dormant aspect of the Commerce Clause, to the extent that they require that all attorneys complete a skills and methods course which mandates in person attendance at course sites in New Jersey.

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No. 97-209

In the

Supreme Court of the United States

October Term, 1997

ROBERT J. TOLCHIN, individually and on behalf of all others similarly situated,

Petitioner,

v.

THE SUPREME COURT OF THE STATE OF NEW JERSEY, ROBERT WILENTZ (intended to be the Chief Judge of the Supreme Court of New Jersey, STEPHEN W. TOWNSEND (intended to be the Clerk of the Supreme Court of New Jersey, THE NEW JERSEY STATE BOARD OF BAR EXAMINERS, SAMUEL J. UBERMAN Intended to be the Assistant Secretary of the New Jersey Supreme Court who plaintiff believes to direct the State Board of Bar Examiners), THE NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION and JOSEPH J. HOGYA (intended to be the Institute for Continuing Legal Education Skills Training Course Director),

Respondents.

On Petition For A Writ of Certiorari To the United States Court of Appeals For The Third Circuit

Brief of the Respondents

COUNTERSTATEMENT OF THE CASE

It is well established that, "(s)ince the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States...." *Leis v. Flynt*, 439 U.S. 438, 442 (1979). In carrying out this function, the Supreme Court of New Jersey has established basic qualifications for the practice of law in its jurisdiction which go beyond the mere possession of a plenary license. First, every attorney wishing to practice law in New Jersey must maintain a "bona fide office" in the State. N.J.Ct.R. 1:21-1(a). Such an office is described as "a place where clients are met, files are kept, the telephone is answered, mail is received, and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable amount of time." *Id.* In addition, all New Jersey attorneys must complete a "skills and methods" course approved by the New Jersey Supreme Court. The requirements of that course, which is presented by respondent New Jersey Institute for Continuing Legal Education ("ICLE"), include mandatory in-person attendance at lectures, which are offered at sites throughout New Jersey. *Ibid.* Both requirements apply to both resident and non-resident attorneys.

Petitioner Robert Tolchin is admitted as an attorney and practices law in New York. Tolchin has passed the New Jersey bar and been licensed in New Jersey; however, he has indicated that he is unwilling to attend a "skills and methods" course at a location in New Jersey, or to maintain a bona fide office in New Jersey. Therefore, Tolchin challenged these standards in the United States District Court for the District of New Jersey, arguing that they violate the Commerce, Equal Protection, and Privileges and Immunities Clauses of the Constitution. Tolchin's Complaint also raised

an additional argument that the standard requiring mandatory attendance of the skills and methods course lectures deprived him of Due Process, because the New Jersey Board of Bar Examiners had not adopted rules governing the course format and curriculum. The District Court rejected Tolchin's claims and granted the defendants' motions for summary judgment.

Tolchin's petition seeks review of the decision of the Third Circuit affirming the grant of summary judgment. His petition raises only the argument that the New Jersey Supreme Court's standards violate the Commerce Clause. Tolchin has apparently abandoned his claims that the standards also violate the Privileges and Immunities, Equal Protection, and Due Process Clauses, all of which were also rejected by the Third Circuit.[1]

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[1] The Third Circuit rejected Tolchin's claim that R. 1:21-1(a) violates the Privileges and Immunities Clause because both of the challenged requirements affect in-state and out-of-state lawyers in a substantially equal way. Moreover, the rule's requirements provide a reasonable means for New Jersey to protect its legitimate interests in regulating the quality of its bar. (App. 32).

Similarly, the Third Circuit rejected Tolchin's Equal Protection challenge to the bona fide office and course attendance requirements, finding that both of the New Jersey Supreme Court's requirements were rationally related to its interest in regulating the practice of law. (App. 35-36).

Finally, Tolchin claimed that the attendance requirement of the skills and methods course deprived him of rights without Due Process, because the New Jersey Board of Bar Examiners failed to adopt formal rules governing the format and curriculum of that course, as required by N.J.Ct.R. 1:26, which provides that the skills and methods "course format shall be set forth in the rules of the Board of Bar Examiners." The Third Circuit rejected this claim, finding that an agency's failure to follow its own rules is not a per se violation of Due Process. (App. 36). Moreover, the court found that Tolchin made no showing that he relied on N.J.Ct.R.

Tolchin's challenge to the New Jersey Supreme Court's rules invokes the dormant aspect of the Commerce Clause, which "prohibits economic protectionism." *Indiana v. Limbach,* 486 U.S. 269, 273 (1988). Specifically, Tolchin argues that the bona fide office requirement and mandatory attendance requirements, which by their terms apply in exactly the same manner to resident and non-resident attorneys, in fact have such a detrimental effect on non-resident attorneys that they effectively regulate or discriminate against interstate commerce. The Third Circuit rejected this argument, applying well-established standards for the review of Commerce Clause challenges. First, the court determined that the bona fide office and the course attendance requirements do not directly regulate or discriminate against interstate commerce. (App. 19). The Third Circuit therefore applied the balancing test developed by this Court to review state laws whose effect on interstate commerce is minimal or indirect. *See Brown-Forman Distillers Corp. v. New York Liquor Authority,* 476 U.S. 572, 578-79 (1986). This test compares "the local benefits of a regulation with the incidental burdens that it imposes on interstate commerce in order to determine whether the burdens are clearly excessive." (App. 19); citing *C. & A. Carbone, Inc. v. Town of Clarkstown,* 114 *S. Ct.* 1677, 1679 (1994).

Reviewing the bona fide office rule in this manner, the Third Circuit found that any differential impact that this requirement may have on out-of-state lawyers is the consequence not of a lawyer's status as a resident or non-resident of New Jersey, but rather of "the size and type of an attorney's practice." (App. 17). As the decision notes, "the only attorneys actually burdened by this requirement are those who wish to maintain a small or sporadic practice in

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1:26 to his detriment. (App. 38).

New Jersey." (App. 17). Since it is likely that there are resident attorneys who might wish to maintain a small or sporadic practice, but who are also required to maintain a bona fide office, the rule does not place a significantly different burden on persons wishing to engage in multistate practice. Consequently, the Third Circuit found that the bona fide office requirement does not have a discriminatory impact on interstate commerce. (App. 18).

Similarly, the court found that the mandatory attendance requirement for the skills and methods course does not impose a greater burden on non-resident attorneys. Indeed, as the court noted, this requirement may impose an equal or greater burden on certain New Jersey attorneys, since some locations in New Jersey may be even more distant from course sites than out-of-state locations. (App. 24). Consequently, the Third Circuit concluded that neither requirement has a direct effect on interstate commerce. (App. 19).

Having concluded that the rule did not directly discriminate against interstate commerce, the Third Circuit next considered whether any incidental burdens created by the rules are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Both the bona fide office and the course attendance requirements survived this test. First, the Third Circuit identified the state interest to be served by the bona fide office requirement. As stated by the New Jersey Supreme Court, the purpose of this requirement is to promote attorney competence, accountability and accessibility. (App. 19). See *Matter of Kasson,* 141 N.J. 83, 87, 660 A.2d 1187, 1189 (1995). Although the Third Circuit rejected the idea that requiring an attorney to maintain an office in New Jersey can be justified as a means to assure attorney competence or accountability, it did find that the requirement bears a rational relationship to the goal of assuring attorney accessibility. (App. 21). In making this determination, the

Third Circuit cited the findings of the New Jersey Supreme Court in *Matter of Kasson, supra,* as an example of accessibility problems sought to be addressed by the rule. In that case, an attorney who failed to maintain a bona fide office was disciplined after a state court judge encountered numerous difficulties in contacting him. *Matter of Kasson, supra,* 660 A.2d at 1188. Thus, although the Third Circuit noted that the bona fide office requirement does have a peripheral effect on interstate commence, since to some degree it "limits the mobility of some lawyers and reduces the options for consumers of the services they provide(,)" the court concluded that this burden does not clearly outweigh the rule's beneficial effect on the promotion of a legitimate state interest in attorney accessibility. (App. 22).

The Third Circuit also upheld the requirement for in-person attendance at the approved skills and methods course, which is offered only at sites in New Jersey. It found this requirement to be sufficiently related to its intended educational benefit, which is to ensure that New Jersey attorneys are at least minimally familiar with New Jersey law. As explained by the court, the attendance requirement "ensures that attorneys hear -- if not listen to -- those topics thought to be important by Appellees." (App. 23). Conversely, this requirement creates a substantial burden only for those attorneys who reside a great distance from New Jersey, who presumably make up only a small number of lawyers who wish to practice in New Jersey. (App. 24).

REASONS FOR DENYING THE PETITION

THE THIRD CIRCUIT PROPERLY APPLIED WELL ESTABLISHED PRECEDENT TO REACH ITS DETERMINATION THAT THE NEW JERSEY SUPREME COURT'S STANDARDS GOVERNING THE PRACTICE OF LAW DO NOT VIOLATE THE COMMERCE CLAUSE.

A. The New Jersey Supreme Court's Standards Governing the Practice of Law in New Jersey Do Not Discriminate Against Interstate Commerce Because They Apply Equally to Resident and Non-Resident Attorneys.

Certiorari should be denied because Tolchin's Commerce Clause challenge to New Jersey's requirements for practicing lawyers fails to raise any novel or important issues that require the attention of this Court. Rather, this case involves a simple application of the balancing test that was long ago developed by this Court for review of Commerce Clause challenges to state laws. Applying this test, a state law which is facially neutral, and does not have a discriminatory effect on interstate commerce, will be upheld unless it creates a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc., supra,* 397 U.S. at 137.

The standards for the practice of law in New Jersey established by the New Jersey Supreme Court and set forth in N.J.Ct.R. 1:21-1(a) clearly survive that test. The requirements for a bona fide office and for course attendance apply equally to in-state and out-of-state attorneys, and have only a minimal or incidental effect on interstate commerce. They also reflect a rational method for the achievement of New Jersey's legitimate objective, which is to establish appropriate standards for the practice of law in New Jersey.

Therefore, the Third Circuit's rejection of Tolchin's Commerce Clause challenge was clearly correct, and need not be reviewed or disturbed by this Court.

The Third Circuit's analysis of the bona fide office and course attendance requirements turns primarily on the fact that the rules apply in exactly the same manner to in-state attorneys as to out-of-state attorneys, and that any incidental burden on the ability of out-of-state lawyers to participate in New Jersey practice is minimal. Indeed, as the court noted, the requirement that an attorney maintain an office in New Jersey imposes an equal financial burden whether the attorney practices primarily in or outside of the state. Stated differently, the minimum cost of practicing law in New Jersey, which is the cost of maintaining a bona fide office in that state, is exactly the same regardless of whether the attorney has offices in another state as well. Similarly, depending on the location of the skills and methods course sites, in-person attendance may be equally, or more, inconvenient for a lawyer in a remote part of New Jersey than it may be for some out-of-state lawyers.

Tolchin argues that the out-of-state lawyer suffers more from the bona fide office requirement because he incurs an additional expense by opening a New Jersey office, which presumably will be in addition to the office which he has in his home state.[2] The Third Circuit examined this assertion and concluded that any incidental financial burden on out-of-state lawyers stems from the fact that such lawyers may wish to maintain an occasional or sporadic practice in New Jersey, rather than from their status as out-of-state lawyers. As the court noted, a New Jersey lawyer also may wish to maintain

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[2]A similar argument was rejected in *Scariano v. Justices of the Supreme Court of Indiana*, 38 F.3d 920, 927, n. 8 (7th Cir. 1994), *cert. denied*, – U.S. --, 115 S.Ct. 2582, 132 L.Ed.2d 831 (1995) (Noting that there is nothing improper with requiring a lawyer who wants to practice in two states to take a bar exam in each state).

an occasional or limited practice, or, indeed, may have other reasons why he might not wish to incur the expense of actually opening an office. The New Jersey lawyer is nevertheless required to incur this financial burden. Thus, the bona fide office rule asks nothing of an out-of-state lawyer that is not also required of New Jersey lawyers.

Thus, although the additional cost of maintaining a New Jersey office may have an effect on the decision of an out-of-state lawyer to maintain a small or occasional practice in New Jersey, the rule will have the same financial effect on a New Jersey lawyer who similarly wishes to maintain a small or sporadic practice. As the Third Circuit concluded, the impact of the rule on any attorney, whether resident or non-resident, is a function of the size of the practice that the attorney decides to maintain, rather than on the location of his primary practice.

It is also clear that the Third Circuit correctly concluded that the requirement for personal attendance at the skills and methods classes in New Jersey has a negligible impact on interstate commerce. Indeed, Tolchin himself makes this point when he argues that out-of-state lawyers are sufficiently accessible to New Jersey courts without a bona fide office, because the majority of out-of-state attorneys who wish to practice in New Jersey are located in cities or areas near New Jersey. If one accepts the assertion that most of the out-of-state lawyers who wish to practice in New Jersey are sufficiently accessible to New Jersey courts from their out-of-state offices, it follows that at least one of the course sites will also be reasonably convenient. Only those lawyers who reside a great distance from New Jersey will be burdened by the need to attend classes, and these persons, as the Third Circuit noted, presumably comprise only a small group. Moreover, although the court did not express this view, a group that is unable to travel to a course site in New Jersey is likely to have inherent accessibility problems.

Therefore, the course attendance requirement does not place an unreasonable burden on out-of-state lawyers.

It is clear from the foregoing that the rules in question do not create different standards or problems for non-resident attorneys. Because resident and non-resident lawyers can practice law in New Jersey on an equal footing, there is no serious issue as to the constitutionality of these requirements that warrants review by this Court.

B. The New Jersey Supreme Court's Bona Fide Office Rule is Appropriately Related to the Goals of Attorney Accessibility, Accountability, and Competence.

Having determined that the burden created by the bona fide office requirement is a minimal one, the Third Circuit also correctly concluded that this burden is outweighed by the state interest in assuring "attorney accessibility for clients, courts, counsel and parties...." (App. 16). In reaching this conclusion, the Third Circuit recognized that accessibility problems had been encountered by New Jersey and, indeed, that there is a reported decision of the New Jersey Supreme Court on the issue. *See In the Matter of Kasson, supra,* 660 A.2d at 1187. In that case, disciplinary action was brought against a Philadelphia lawyer doing business in New Jersey after a trial judge had encountered difficulty locating him. An investigation revealed that the attorney's name was misspelled on a sign where his New Jersey office was supposed to be located, that his letterhead listed his office suite number differently than it was listed at the office building itself, and that, indeed, there appeared to be no suite or office at all. *Id.* at 1188. As the New Jersey Supreme Court noted, "(t)he frustration of a judge's attempt to schedule trial matters when confronted with this situation cannot be tolerated." Id. at 1189. Thus, the state interest addressed by the bona fide office rule includes not only the

need for lawyers to be accessible to clients, but to the bar and judges as well.[3]

Tolchin's own plans with respect to New Jersey practice suggest the inherent problems of attorney unavailability that the rule seeks to address by requiring an in-state office. Specifically, during oral argument before the Magistrate Judge, Tolchin indicated that he was considering relocating his practice to Mexico or the Netherlands, and would continue to represent certain clients in New Jersey actions from such a location (App.71). The difficulties caused by such a distant practice are exactly what the bona fide office requirement is designed to avoid. Moreover, it is worth noting that even if not admitted to practice in New Jersey, Tolchin is not precluded from representing such clients on a *pro hac vice* basis so long as he has a local counsel to satisfy the need for accessibility, and meets the other requirements of such an admission. *See* N.J.Ct.R. 1:21-2. The rules governing the practice of law in New Jersey must regulate not only those lawyers who are located close to New Jersey, but also those whose remote location raises even more serious questions of accessibility.

In addition to accessibility, the New Jersey Supreme Court also believes that its bona fide office rule promotes competence by requiring a commitment to the State which should, in turn, ensure that attorneys are familiar with local custom as well as developments in local law. The rule thus is designed to "ensure that attorneys representing New Jersey clients in New Jersey courts are sufficiently familiar with state law and practice to represent their clients knowledgeably and effectively." *Matter of Kasson, supra,*

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[3] In fact, the rule applies not only to lawyers in a distant forum or country, but to in-state lawyers who may otherwise desire to practice out of the back of their car or in the hallways of the courthouse. Such a practice is prohibited by the rule which requires such lawyers to have a bona fide office where they can be reached either directly or indirectly.

660 A.2d at 1189, quoting *Ingemi v. Pelino & Lentz,* 866 F.Supp. 156, 162 (D.N.J. 1994). As the Iowa Supreme Court stated in explaining the benefits of its similar, but more demanding, rule:

> The ongoing and substantial physical presence contemplated by our office requirement insures... that the applicant ... will.. become proficient in his or her knowledge of Iowa statutes, case law, and procedures. An applicant who does not intend to be present in the Iowa office for a substantial and scheduled period of time, servicing Iowa clients, lacks sufficient incentive to master those matters unique to Iowa law. Occasional forays into the state to service out-of-state clients do not provide this assurance. [*In re Arthur,* 415 N.W.2d 168, 170 (Iowa 1987)].

The bona fide office requirement of N.J.Ct.R. 1:21-1 also provides an important tool in the establishment and enforcement of attorney accountability. Specifically, N.J.Ct.R. 1:21-6(b) identifies records of trust and business accounts that must be maintained by all lawyers, including receipts, journals and ledgers. These records are to be "located at the principal New Jersey office of each attorney... and shall be available for inspection, checks for compliance with this rule and copying at that location by a duly authorized representative of the Office of Attorney Ethics." N.J.Ct.R. 1:21-6. This bookkeeping requirement is designed to "prevent improper recordkeeping by attorneys and to avoid financial impropriety which may result therefrom." Notice to the Bar, issued November 22, 1978 by the Administrative Director of the Courts of New Jersey, 102 New Jersey Law Journal 1 (November 30, 1978). The rule contemplates the use of random audits of these records to encourage proper recordkeeping and to uncover improprieties. *Id.* A bona fide office requirement thus

ensures that all lawyers will have a location within the state where the Court knows it can find their records for audit.

New Jersey clearly has a legitimate interest in assuring that its court officers can easily obtain access to an attorney's trust account and other records, without requiring auditors to travel to another state, or to seek an exercise of another state's jurisdiction in order to obtain their production. The ability to require lawyers to name the Clerk of the Court as their agent for process and to bring disciplinary actions does not fully address New Jersey's concern that it be able to exercise direct supervisory control over the proper handling of attorney trust accounts, nor does it replace the ability to use spot check audits to prevent violations. Disciplinary action following an infraction or impropriety in the handling of a client's trust account is no substitute for the preventive effect that a surprise audit may have on an attorney's bookkeeping practices.

Indeed, because of its close relationship to the recordkeeping requirement, the bona fide office requirement is justified not only by the need to assure attorney accessibility, as found by the Third Circuit, but by the need to maintain attorney accountability as well. The recordkeeping requirement of N.J.Ct.R. 1:21-6(b) provides a further illustration of how the in-state office requirement furthers the State's regulatory interest in the practice of law.

C. The Bona Fide Office Rule Is Consistent With Other Decisions of This Court.

The constitutionality of the New Jersey Supreme Court's bona fide office requirement is also suggested by this Court's discussions of similar state bar requirements in other cases. This Court has not ruled directly on whether a state court's bona fide office requirement, equally applicable to both resident and non-resident attorneys, may be used to promote attorney competence, accessibility, and accountability.

However, in at least one other case it has approvingly discussed, in *dicta,* state bar requirements which seek to promote similar goals by assuring that an attorney has adequate contacts with the practice of law in that state.

This Court approvingly discussed an in-state office requirement in the context of the review of a Virginia residency requirement, challenged as violative of the Privileges and Immunities clause. *Supreme Court of Virginia v. Friedman,* 487 U.S. 59 (1988). Virginia's goal in imposing this condition, which was applicable only to out-of-state lawyers admitted on waiver of the bar examination, was to assure that such lawyers "will have the same commitment to service and familiarity with Virginia law that is possessed by applicants securing admission upon examination." *Id.* at 68. This Court invalidated the residency requirement, but went on to consider whether Virginia could achieve its goals through other, less restrictive means. It found that such means existed in another provision of the same Virginia court rule, which required that "attorneys ... admitted [on motion] show their intention to maintain an office and a regular practice in the state(.)" *Id.* at 68. That requirement, this Court found, was sufficient to ensure "that such attorneys will have an interest in the practice of law in Virginia that is at least comparable to... applicants admitted upon examination." *Id.* at 69.[4] Thus, the Virginia rule

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[4] The Supreme Court of Virginia also argued that the residency requirement "facilitates enforcement" of another requirement, contained in the same rule, that out-of-state lawyers admitted on motion engage in the practice of law in Virginia on a full-time basis in order to qualify for admission. *Id.* at 69. The decision suggests that Virginia could also look to its in-state office requirement "to protect whatever interest the State might have in the full time practice restriction." *Id.* at 69-70. This full-time practice requirement, although it applied only to out-of-state lawyers admitted on motion, nevertheless is clearly more burdensome than a requirement to maintain a bona fide office. This Court, however, did not reject this full-time practice requirement, but rather took it into account as

discussed in *Friedman* involved the use of an in-state office requirement to assure attorney familiarity with State law, as well as to promote a more amorphous concern with assuring a "commitment to service" Virginia. *Id.* at 54.

That case is significant here because it expressly recognizes that an attorney's regular presence and practice in a state may give a state the means to establish his commitment to establishing familiarity with that state's laws. In light of this, the bona fide office rule is correctly viewed as an appropriate exercise of the discretion entrusted to the states to protect the "compelling state interest in the practice of professions within their boundaries," *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975).

Tolchin claims that the Supreme Court of New Jersey's requirement is directly in conflict with the decision of this Court in *Frazier v. Heebe,* 482 U.S. 641 (1987). That case invalidated an in-state office requirement, adopted by the United States District Court for the Eastern District of Louisiana, which applied to non-resident lawyers only. *Id.* at 646. However, *Frazier* is distinguishable from the matter at hand in several significant respects. The most obvious distinction is that the District Court rule, unlike the New Jersey rule, expressly discriminated against out-of-state lawyers. *Id.* Specifically, the Eastern District of Louisiana required that an in-state office be maintained only by attorneys who were not residents of Louisiana. *Id.* at 646. This reason was clearly discussed in the Court's decision as one of the elements that made the in-state office requirement "unnecessary and irrational." *Id.* at 649. As the Court noted, "a resident lawyer with an out-of-state office is

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an objective that could be enforced through the use of an in-state office requirement.

equally as unavailable to the court as a nonresident lawyer with an out-of-state office." *Id.* at 646.

Other significant differences exist as well. Because the *Frazier* Court was reviewing a District Court rule rather than a state court rule, it applied a standard of review that is not applicable here. As the opinion expressly points out, the Court's purpose on review was not to determine the compliance of the rule with basic federal constitutional guarantees, but rather to review its merits, pursuant to the Supreme Court's "inherent supervisory power to ensure that these local rules (of the federal district courts) are consistent with "the principles of right and justice." Id. at 645 (citations omitted); *see also* 28 U.S.C. § 2071. As the decision notes, "the court's supervisory power over federal courts allows the court to intervene to protect the integrity of the federal system, while its authority over state-court bars is limited to enforcing federal constitutional requirements." *Id.* at 647, n. 7. Thus, the concerns which prompted this Court to undertake a full review of the merits of that rule in *Frazier* are not present in the review of the constitutional challenge brought here.

The District Court rule invalidated in *Frazier* also contained other infirmities that are not present in the New Jersey rule. Specifically, that rule mandated that an attorney have an office in the State of Louisiana, but not necessarily in the Eastern District. In fact, "(t)he office requirement does not specify that counsel *be* in the Eastern District, but only that the attorney have an office somewhere in the State, regardless of how far that office is from the courthouse." *Id.* at 650. This aspect of the rule further attenuated its effectiveness in ensuring attorney availability.

Finally, as the *Frazier* decision notes, rules discriminating against non-resident attorneys are more difficult to justify in the context of the federal courts than in a State court system, "where laws and procedures may differ

substantially from State to State." *Id.* at 647, n. 7. Consequently, it can be presumed that a federal court will have more difficulty in showing a legitimate interest to be protected by rules designed to limit bar admission to persons who have particular familiarity with its rules and procedures.

Thus, *Frazier's* applicability to the review of the New Jersey Supreme Court's rule is limited, because it did not undertake a constitutional review of an in-state office requirement, nor did it involve review of a rule which, like New Jersey's, applies equally to in-state and out-of-state lawyers. Because of this distinction, no true conflict or uncertainty is created by a reading of that decision as compared with this Court's later dicta in *Friedman*, or, indeed, between the decision in *Frazier* and the conclusion of the Third Circuit which Tolchin seeks to challenge here. While the Third Circuit did rely on *Frazier* to reject New Jersey's argument that an in-state office helps it assure attorney competence, *id.* at 648, that conclusion reflects an overly broad reading of that decision. *See Frazier v. Heebe, supra,* 482 U.S. at 647, n. 7. *Frazier* is thus of limited applicability here; in contrast, a review of the discussion of Virginia's requirements in *Friedman* clearly indicates that the New Jersey Supreme Court's rule sets constitutionally permissible standards for the practice of law.

When it adopted its current bona fide office requirement, the New Jersey Supreme Court was cognizant of the need to tailor its rules to establish appropriate standards for legal practice while still allowing the broadest possible participation in New Jersey practice by lawyers from other jurisdictions. Indeed, even before this Court's decision in *Supreme Court of New Hampshire v. Piper, supra,* made clear that a state cannot create different bar admission requirements for qualified out-of-state lawyers, the New Jersey Supreme Court had already taken action to change its own in-state office requirement, which had formerly applied only to non-residents, by making it equally applicable to

New Jersey residents as well. *Matter of Sackman,* 90 N.J. 521, 448 A.2d 1014, 1018-19, 528-529 (1982). In so doing, the New Jersey Supreme Court recognized that it is not in the public interest to exclude non-resident lawyers, but that, rather, the public is better served by efforts "to make more qualified lawyers available to New Jersey's citizens." *Id.* at 1019. The current bona fide office requirement thus was adopted not, as Tolchin suggests, to exclude out-of-state attorneys from New Jersey, but rather to place these attorneys on the same footing as their New Jersey counterparts, in order to achieve "the tailoring of a rule allowing interstate movement while at the same time assuring a sufficient degree of competence, accessibility and accountability." Id. at 1020. As such, it is a proper exercise of the New Jersey Supreme Court's discretion to adopt requirements that protect the quality of its bar, *Goldfarb v. Virginia State Bar, supra,* at 792, and does not run afoul of the Commerce Clause.

D. The In-Person Attendance Requirement of the Skills and Methods Course is Properly Related to the Goal of Attorney Competence.

The rule requiring attorneys who wish to practice in New Jersey to attend, in person, a series of lectures as part of a "skill and methods" course, is also clearly within the class of state bar requirements which this Court has deemed acceptable measures to assure that attorneys are competent and have some knowledge of local law. This Court has, in successive cases dealing with bar admission requirements, approvingly discussed such continuing legal education requirements. For example, *Supreme Court of New Hampshire v. Piper, supra,* 470 U.S. at 285, n. 19, while striking down a state residency requirement for lawyers, suggests that "(a) less restrictive alternative (to assuring attorney competence and knowledge of State law) would be to require mandatory attendance at periodic seminars on state practice. " A similar statement was made in the other

leading case on residency requirements, *Supreme Court of Virginia v. Friedman, supra,* 487 U.S. at 69, which suggests that, as a means of "assuring that its attorneys keep abreast of legal developments,..." a state may wish to "require mandatory attendance at periodic continuing legal education courses." *See also Frazier v. Heebe, supra,* 482 U.S. at 648 ("other more effective means of ensuring the competence of bar members are available to the district courts, including examination or seminar attendance requirements.")

Tolchin argues that the need for such a requirement, like that for a bona fide office, has been negated by technological advances. For example, he suggests that the state could be required to allow an out-of-state attorney to purchase and view video lectures as a reasonable alternative to in-person attendance. However, mandatory attendance serves a specific purpose. As the Third Circuit noted, it assures that attorneys will actually hear, if not listen to, the lectures (App. 23). In addition, while the requirement is not so burdensome as to be unreasonable, participation does demonstrate a level of commitment to practice in New Jersey and learning that State's laws and procedures, whether it be by a New Jersey lawyer or an out-of-state lawyer. Indeed, Tolchin's argument appears to be that it is too troublesome for an out-of-state attorney to travel to course sites in New Jersey. This claim is difficult to reconcile with Tolchin's assertion that he is, at the same time, readily accessible to courthouse locations in New Jersey.

Of course, the mandatory attendance requirement may be problematic for persons located thousands of miles away from New Jersey. However, not only can it be presumed that these individuals comprise a very small number of the pool of lawyers who wish to practice in New Jersey, but they are a group with inherent problems of accessibility to the courts. The Commerce Clause does not, as Tolchin seems to suggest, require New Jersey to use technological

advances in communication to make its courts, its supervisory personnel, or its skills and methods courses travel electronically to practitioners in other states or remote parts of the country. Permission to practice law in New Jersey presumes, as a matter of logic and tradition, that the practice will occur there. Consequently, it is respectfully suggested that this Court should find that Tolchin's petition fails to present a significant question or conflict of law that calls for an exercise of this Court's jurisdiction.

CONCLUSION

For the foregoing reasons, the New Jersey Supreme Court's standards clearly represent an exercise of its discretionary powers to regulate the practice of law within its borders. Any incidental effect that the implementation of these standards may have on interstate commerce is minimal, and more than adequately outweighed by the purpose of assuring attorney availability, accountability and competence. Therefore, it is respectfully suggested that Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ROBERT J. TOLCHIN, individually and on behalf of all others similarly situated,

Petitioner,

v.

THE SUPREME COURT OF THE STATE OF NEW JERSEY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF AMICUS CURIAE OF THE NEW JERSEY STATE BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amicus Curiae, the New Jersey State Bar Association, adopts and incorporates the Questions Presented as set forth by Respondents, the Supreme Court of the State of New Jersey and the Institute for Continuing Legal Education.

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BRIEF *AMICUS CURIAE* OF THE NEW JERSEY STATE BAR ASSOCIATION IN SUPPORT OF RESPONDENTS[1]

Amicus Curiae, the New Jersey State Bar Association ("NJSBA"), as the primary voice of the members of the New Jersey bar, hereby requests that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit sought by Petitioner, Robert J. Tolchin ("Petitioner" or "Tolchin"), be denied.

STATEMENT AND INTEREST OF *AMICUS CURIAE*

Petitioner challenges the authority of the New Jersey Supreme Court to determine the requirements it will impose on those seeking to practice law within its jurisdiction. This Court has traditionally recognized the autonomy of the states to set the qualifications for persons who wish to practice law in that state. *See, e.g., Leis v. Flynt,* 439 U.S. 438, 442, 444 n.5 (1978) (recognizing "the traditional authority of state courts to control who may be admitted to practice" and noting that "[s]ince the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States"); *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975) (recognizing that states have "broad power to establish standards for

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae,* its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

licensing practitioners and regulating the practice of professionals").

Over the past two decades, many lawyers have petitioned this Court for writs of certiorari charging that various state laws, rules and regulations governing the practice of law are unconstitutional. Only twice during that time has this Court granted writs to review such challenges. *See Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). On two other occasions, this Court has granted writs of certiorari to review the local rules of two United States District Courts that placed certain requirements on those that sought to practice law within their respective jurisdictions. *See Barnard v. Thorstenn*, 489 U.S. 546 (1989); *Frazier v. Heebe*, 482 U.S. 641 (1987).

In each of these rare cases, the rule or regulation at issue facially discriminated against out-of-state residents in favor of in-state residents. *See Barnard*, 489 U.S. at 549 (local rule of the United States District Court for the District of the Virgin Islands required all attorneys otherwise qualified to demonstrate that he or she had "resided in the Virgin Islands for at least one year preceding his or her proposed bar admission" and had an intention to continue residing in the Virgin Islands and to practice law there); *Friedman*, 487 U.S. at 61 (Virginia rule allowed "qualified lawyers admitted to practice in other States" to be admitted to the Virginia Bar on motion upon a showing that the applicant was "a permanent resident of Virginia"); *Frazier*, 482 U.S. at 642 (local rule of the United States District Court for the Eastern District of Louisiana

required bar applicants to either live in Louisiana or maintain an office in Louisiana); *Piper*, 470 U.S. at 277 n.1 (New Hampshire rule required all bar applicants to "either be a resident of New Hampshire or file a statement of intent to reside there" and to be a "bona fide resident of the State . . . at the time the oath of office . . . is administered"). Accordingly, this Court reviewed the challenged rules under either the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution, or under its own "inherent supervisory power" over the United States District Courts.

Unlike the rules reviewed by the Court in each of these previous cases, the rule challenged here, N.J. Ct. R. 1:21-1(a) (the "Rule"), applies equally to all New Jersey lawyers regardless of domicile and it does not facially discriminate against non-residents. *Tolchin v. Supreme Court of the State of New Jersey*, 111 F.3d 1099, 1107 (3d Cir. 1997). Presumably realizing that a Privileges and Immunities Clause challenge would necessarily fail, Tolchin petitions this Court to review the constitutionality of the Rule solely under the Dormant Commerce Clause of Article I, § 8, clause 3.

In an opinion written by Judge Lewis, joined in full by Judge Cowen, and joined in part by Chief Judge Sloviter, the Third Circuit Court of Appeals properly rejected Petitioner's Dormant Commerce Clause challenge and upheld the constitutionality of the Rule. *Tolchin*, 111 F.3d at 1107. The Third Circuit did so by applying the balancing test announced by this Court in *Pike v. Church*, 397 U.S. 137 (1970), and refined in *Brown-Forman Distillers Corp. v. New York Liquor Authority*, 476

U.S. 573 (1986) (hereinafter the "*Pike/Brown* balancing test"). *Tolchin*, 111 F.3d at 1107.

Notably, Petitioner does not seriously contend that the Third Circuit should have applied a level of scrutiny other than the *Pike/Brown* balancing test. Instead, Tolchin's primary argument is that the Third Circuit reached the wrong result under the test. This Court typically declines to grant writs of certiorari when the petitioner is simply unhappy with the result reached below. *See Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) (certiorari is not appropriate when the petitioner seeks to challenge only the correctness of the lower court's decision); *see also* ROBERT L. STERN, ET. AL., SUPREME COURT PRACTICE § 4.17 (7th ed. 1993) ("It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions.").

Even if this were one of the rare cases in which the Court would consider examining the correctness of the result reached by the Third Circuit, Judge Lewis's analysis rests on solid grounds that would not justify further review by this Court. As the Third Circuit concluded, the Rule is rationally related to the legitimate state interests advanced below by the New Jersey Supreme Court and the Institute for Continuing Legal Education. In addition, the Rule is also rationally related to the additional legitimate state interests advanced herein by the NJSBA as *amicus curiae*. Accordingly, this Court should not grant Tolchin's petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

The Rule establishes four requirements that all attorneys wishing to practice law in New Jersey must meet. Specifically, all New Jersey attorneys must (1) hold a plenary license, (2) comply with the skills and methods course requirements in effect on the date of the attorney's admission to the bar, (3) be in good standing, and (4) maintain a bona fide office for the practice of law in New Jersey. N.J. Ct. R. 1:21-1(a). The four requirements apply to all lawyers, regardless of where they are domiciled.[2]

Tolchin contends here, as he did below, that the bona fide office requirement and the skills and methods course requirement are unconstitutional under the Dormant Commerce Clause.

1. Tolchin Tacitly Concedes that the Third Circuit Properly Applied the *Pike/Brown* Balancing Test

The Third Circuit rejected Tolchin's Dormant Commerce Clause challenge by applying the *Pike/Brown* balancing test. *Tolchin*, 111 F.3d at 1108-11. Under the *Pike/Brown* balancing test, a court "must compare the local benefits of a regulation with the incidental burdens that it imposes on interstate commerce in order to determine whether the burdens are clearly excessive." *Id.* at 1108 (citing *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 824 (3d Cir. 1994)). If the Court concludes, as the Third Circuit did below, that the challenged rule

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[2] The history of N.J. Ct. R. 1:21-1(a) is set out in detail in the Third Circuit's opinion and need not be repeated here. *See Tolchin*, 111 F.3d at 1103-05.

"only indirectly affects interstate commerce and regulates evenhandedly, a determination must be made as to whether the State's interest is 'legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.' " *Id.* at 1107 (quoting *Brown-Forman*, 476 U.S. at 579).

Tolchin does not seriously contend that the Third Circuit should have reviewed the Rule under any standard other than the *Pike/Brown* balancing test, such as the heightened scrutiny applicable when a state law facially or effectively discriminates against out-of-state interests. *See Brown-Forman*, 476 U.S. at 579.[3] Likewise, while Tolchin contends that "thousands" of lawyers and law firms are impacted by the Rule, *Petition* at 24, he does not contend that the Third Circuit wrongly concluded that the Rule only has an indirect effect upon interstate commerce.

Therefore, Tolchin tacitly concedes, as he must, that the Third Circuit properly invoked the *Pike/Brown* balancing test and that, because the Rule's impact on interstate commerce is only indirect, the Rule will withstand a Dormant Commerce Clause challenge so long as it is rationally related to a legitimate state interest. As demonstrated below, the Third Circuit's conclusion that the bona fide office requirement and the skills and methods course requirement are rationally related to legitimate state interests was wholly proper.

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[3] Tolchin renders lip service to the heightened scrutiny standard in only a single sentence. *Petition* at 20.

2. The Bona Fide Office Requirement is Rationally Related to Legitimate State Interests

Before both the district court and the Third Circuit, Respondent, the Supreme Court of the State of New Jersey, explained that the bona fide office requirement "has the benefits of assuring the competence, accountability and accessibility of attorneys for the benefit of clients, courts, counsel and parties." *Tolchin*, 111 F.3d at 1108. After analyzing this aspect of the Rule, the Third Circuit concluded that "a rational relationship exists between the benefit of attorney accessibility and the bona fide office requirement." *Id.* at 1109.

In his petition, Tolchin does not argue that the Third Circuit wrongly concluded that New Jersey has a legitimate interest in ensuring the accessibility of New Jersey attorneys to courts, clients, counsel, and parties. Instead, he contends that the bona fide office requirement is not rationally related to this legitimate state interest. The principal argument he advances in support of this contention is that this Court allegedly dismissed a similar argument in *Frazier v. Heebe*, 482 U.S. 641 (1987), and, therefore, the Third Circuit's decision "directly contradicts" the holding in *Frazier*. *Petition* at 20-22. Tolchin is mistaken.

First, the facts in *Frazier* are quite different from those presented here. In *Frazier*, the Court reviewed a local rule of the United States District Court for the Eastern District of Louisiana that required lawyers seeking to be admitted to the district court bar to either be a resident of Louisiana or to maintain a law office in Louisiana. The local rule did not require Louisiana residents to maintain a

Louisiana office. *Frazier*, 482 U.S. at 642. Therefore, the local rule facially discriminated against non-residents. Here, the Rule neither contains a residency requirement nor facially discriminates against non-residents.

Second, the *Frazier* majority did not review the constitutionality of the challenged local rule. Instead, the majority reviewed the local rule solely under the Court's "inherent supervisory power" to ensure the fairness of the local rules of the various United States District Courts. *Id.* at 645 (quoting *In re Ruffalo*, 390 U.S. 544, 554 (1968) (White, J., concurring)). The distinction was particularly important to the *Frazier* majority, which explained that the Court's authority over the federal courts was broader than its power over the individual state courts. Specifically, the *Frazier* majority noted that the Court's "authority over state court bars is limited to enforcing federal constitutional requirements." *Id.* at 647-48 n.7. The *Frazier* majority also observed that a more lenient standard was appropriate when reviewing state rules seeking to regulate the practice of law because "laws and procedures may differ substantially from state to state." *Id.* (citations omitted).

The three dissenting Justices in *Frazier*, Chief Justice Rehnquist, joined by Justices O'Connor and Scalia, did not agree with the majority's view that the Court possessed the "inherent supervisory power" to set aside local district court rules regulating admission to their respective bars. *Id.* at 651-52 (Rehnquist, C.J., dissenting). Therefore, the dissenting Justices reviewed the constitutionality of the mandatory office requirement and concluded that the rule passed constitutional muster. *Id.* at 655 (Rehnquist, C.J., dissenting).

Thus, the only three members of the Court to review the constitutionality of the mandatory office requirement in *Frazier* found that the requirement was constitutionally acceptable even though it facially discriminated against non-residents. Accordingly, Tolchin's contention that the Third Circuit's decision below "directly contradicts" this Court's ruling in *Frazier* is mistaken.

A subsequent decision of this Court further demonstrates that Tolchin has misread *Frazier*. Just one year after the *Frazier* decision was announced, this Court decided *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988). In *Friedman*, a Virginia state court rule allowed "qualified lawyers admitted to practice in other States" to be admitted to the Virginia Bar on motion upon a showing that the applicant was "a permanent resident of Virginia." *Friedman*, 487 U.S. at 61. Virginia contended, among other things, that the residency requirement advanced the state's interest in ensuring compliance with a separate requirement that members of the bar practice law "full-time" in Virginia. *Id.* at 63.

The majority of the *Friedman* Court, in an opinion authored by Justice Kennedy and joined by Justices Brennan, White, Marshall, Blackmun, Stevens, and O'Connor, held that the residency requirement was unconstitutional under the Privileges and Immunities Clause. *Id.* at 64-65. The majority dismissed Virginia's argument that the residency requirement ensured that attorneys complied with the full-time practice requirement by explaining in *dicta* that Virginia's mandatory office requirement was a "less-

restrictive" alternate means of advancing Virginia's interest in requiring lawyers to practice law full-time in Virginia. *Id.* at 69-70.[4]

Thus, between the dissenting opinion in *Frazier* and the majority opinion in *Friedman*, all of the Justices sitting on this Court during the 1987 and 1988 terms either wrote or joined in opinions supporting mandatory office requirements. Accordingly, Tolchin's contention that this Court has condemned such provisions is wholly mistaken.

If the Third Circuit's opinion in the present case is flawed in any respect, it is in the conclusion of two of the panel's three judges that the bona fide office requirement is not also rationally related to New Jersey's legitimate interest in securing the competency and accountability of those lawyers who practice law in New Jersey.[5]

The Third Circuit rejected the competency argument by relying solely on this Court's opinions in *Frazier*, *Piper* and *Barnard*. *Tolchin*, 111 F.3d at 1108-09 (citations omitted). Each of those cases, however, was decided under either the Privileges and Immunities Clause or this Court's inherent supervisory power over the district courts, and in each of those cases the Court reviewed the challenged rules under heightened scrutiny because the

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[4] In dissent, Chief Justice Rehnquist and Justice Scalia determined that the facially-discriminatory residency requirement – a much more egregious imposition on interstate commerce than that alleged here – passed constitutional muster. *Friedman*, 487 U.S. at 70-71.

[5] Chief Judge Sloviter did not join in this aspect of the opinion. *Tolchin*, 111 F.3d at 1109 n.3.

rules facially discriminated against non-residents. Under the heightened scrutiny analysis applicable in those cases, the Court had to determine if there were less-restrictive means of meeting the proposed state interests.

The same standard does not apply here. Under the *Pike/Brown* test, the state interest need only be rationally related to the challenged rule.[6] Moreover, the challenged rule does not have to be the least-restrictive means of achieving the legitimate state interest.

The bona fide office rule is rationally related to New Jersey's legitimate interest in ensuring the competency of lawyers who practice in New Jersey. The Third Circuit noted that the group of persons affected by the bona fide office requirement was not "a very large class" and included "those who practice solely, but sporadically, in New Jersey," and "those who practice occasionally in New Jersey as part of a large practice based in another state." *Id.* at 1109. Tolchin does not challenge these findings in his petition.

It is undisputed, therefore, that a large percentage of the persons who wish to practice law in New Jersey without a bona fide office dedicate only a small fraction of their respective law practices to New Jersey matters. It

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[6] Notably, the *Freidman* majority did not dismiss Virginia's argument that a mandatory office requirement would help ensure that those who practiced in Virginia's state courts kept "abreast of legal developments. . . . " *Friedman*, 487 U.S. at 69. Instead, the majority simply noted that there were less-restrictive means of achieving the same result, such as mandatory attendance at periodic continuing legal education courses. *Friedman*, 487 U.S. at 69.

is reasonable to assume that most of these attorneys, therefore, do not keep themselves regularly apprised of recent developments in New Jersey law. It is also reasonable to assume that those attorneys who maintain a bona fide office in New Jersey are more inclined to keep abreast of the latest changes in New Jersey's procedural and substantive law. One can also reasonably assume that those attorneys who stay current on the most recent developments are in a better position to serve the courts and their clients than those who do not. Accordingly, the bona fide office requirement bears a rational relationship to New Jersey's legitimate interest in ensuring the competency of those that practice law in New Jersey.[7]

The Third Circuit also should have concluded that the Rule is rationally related to New Jersey's legitimate interest in ensuring the accountability of New Jersey lawyers. The Third Circuit dismissed this argument solely on the grounds that "all non-resident attorneys designate the Clerk of the New Jersey Supreme Court as agent for receipt of service of process." *Id.* Therefore, the Third Circuit reasoned that "[t]he New Jersey Supreme Court can . . . discipline all members of the New Jersey bar, regardless of residency," and held that the Appellees had made "no compelling argument as to how the bona fide office requirement was rationally related to attorney accountability." *Id.* (citing N.J. Ct. R. 1:21-1(a) (1996)).

Accountability of attorneys is not limited, however, solely to judicial discipline. Clients can, and often do,

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[7] The skills and methods requirement does not cover the same ground. The skills and methods requirement deals with basic skills rather than recent developments in practice areas.

pursue legal malpractice claims against their attorneys. The following example demonstrates how the bona fide office requirement advances and, therefore, is rationally related to New Jersey's legitimate interest in ensuring that New Jersey lawyers are accountable to their clients.

An Albany, New York attorney accepts the representation of a New Jersey client in a New Jersey state court matter. The attorney commits malpractice by, among other things, failing to appear at the trial call and causing his client's complaint to be dismissed. The attorney contends that he or she never received notice of the trial date.

The client files a legal malpractice claim against the attorney in the New Jersey state courts. During discovery, the client wishes to depose the attorney's secretary. Because the secretary resides near the attorney's office in Albany, a significant burden is placed on the client. First, she must file a motion for a commission to take an out-of-state deposition under N.J. Ct. R. 4:12-2. Assuming that motion is granted, she must then pay for her and her attorney to travel to, and possibly stay overnight, in Albany where the deposition must be conducted under N.J. Ct. R. 4:14-2(a). If the deposition of the secretary reveals that other members of the attorney's office staff may have had responsibility for keeping track of trial call notices, the process has to start all over again. The defendant lawyer could also insist that all inspections of his documents be conducted at his Albany office under N.J. Ct. R. 4:18-1. Thus, an additional trip to Albany would be required. In many cases, these added costs would make discovery too costly for clients.

Trial of such a case would also be more difficult. The client could not compel anyone other than the defendant to appear at trial and, therefore, the client would be forced to read into the record the deposition transcripts of the witnesses that live outside the court's subpoena power (assuming the client could afford to take the depositions in the first place). This would diminish the trier of fact's opportunity to examine the demeanor and credibility of the witnesses. These added costs and difficulties would have the reciprocal effect of making attorneys less accountable for their malpractice.

The bona fide office requirement, however, eliminates these problems. The attorney and the attorney's staff could be served with subpoenas and deposed in New Jersey. The document inspections would take place in New Jersey. The witnesses could be subpoenaed to appear at trial in New Jersey. Accordingly, the attorney is more likely to be held accountable for his or her malpractice. Under this example, it is easy to see how the bona fide office requirement is rationally related to the state's legitimate interest in assuring attorney accountability.

In addition to the three legitimate interests advanced below by the New Jersey Supreme Court, the bona fide office requirement also advances the state's legitimate interest in encouraging New Jersey attorneys to become involved in community activities and to voluntarily provide pro bono services to the New Jersey communities where their offices are located.

New Jersey is the only state in the nation to compel mandatory pro bono representation by the members of its bar. Melissa Tennen, *Municipal Pro Bono: Going, Going . . . ,*

N.J. LAWYER, Sept. 22, 1997, at 1, 19. In *Madden v. Delran Township*, 126 N.J. 591 (1992), the New Jersey Supreme Court ruled, contrary to decisions in many other states, that the state could constitutionally compel attorneys admitted to the New Jersey bar to represent indigent defendants in the municipal courts without compensation. *Madden*, 126 N.J. at 600-11. Notably, the procedure set forth by the New Jersey Supreme Court in *Madden* provided that these mandatory pro bono assignments be parceled out by the assignment judge in each county to those lawyers who maintained their law offices in that county. This process ensured that lawyers in one part of the state would not be requested to handle pro bono cases at the opposite end of the state. *Id.* at 606-07.

Since 1993, the NJSBA's Special Committee on Pro Bono Services (the "Special Committee") has reviewed the mandatory pro bono system in New Jersey. Among its many tasks, the Special Committee surveyed the state's county bar associations and found that the mandatory pro bono assignments authorized in *Madden* had "expanded far beyond municipal court assignments to superior court assignments in civil cases involving termination of parental rights, domestic violence contempt, juveniles and other family court matters, and municipal court appeals." Mary Coogan, *The 1995 Report of the NJSBA Special Committee on Pro Bono Services*, N.J. LAWYER – THE MAGAZINE, July/Aug. 1997, at 12.

The Special Committee found that "these mandatory *pro bono* assignments have resulted in a heavy and disparate burden on the private bar, leading to the committee's objection to the arbitrary expansion of *Madden* and the

recommendation of a statewide uniform policy identifying case-types that may be assigned *pro bono*." *Id.* at 12. Moreover, the Special Committee found that "the expansion of mandatory *pro bono* assignments dilutes the availability of private attorneys to provide true, voluntary *pro bono* service for civil matters." *Id.*[8]

According to a recent survey, approximately 3000 mandatory pro bono cases are assigned annually to members of the New Jersey bar in addition to the mandatory pro bono municipal court assignments ordered in *Madden*. Tennen, *Municipal Pro Bono* at 1.

The New Jersey Law Journal annually surveys large New Jersey law firms to gauge the number of *pro bono* hours logged by attorneys at the firm. The 1997 survey noted that the state's 20 largest law firms contributed approximately 50,000 hours of pro bono services in 1996. Matt Ackerman, Erin McIntyre, & Neal Winters, *Pro Bono Efforts Ebbing Statewide*, N.J. LAW JOURNAL, June 30, 1997, at 148. When added to the efforts of New Jersey's many solo practitioners and smaller law firms, along with the many bar association programs that coordinate the pro bono efforts of New Jersey lawyers, the number of volunteer hours provided by the New Jersey bar is staggering.

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[8] On September 24, 1997, New Jersey Governor Christine Todd Whitman signed into law bill S-1886, which mandates that every municipality in the state have a public defender within six months. This new law will eliminate mandatory municipal court pro bono representation by members of the New Jersey bar, but not the expanded mandatory pro bono assignments annually distributed to members of the New Jersey bar in the state's Superior Court. Tennen, *Municipal Pro Bono* at 1.

See, e.g., Mary Coogan, *Pro Bono Attorneys: A Sampler*, N.J. LAWYER – THE MAGAZINE, July/Aug. 1997, at 22-27.

Despite the extraordinary volunteer efforts of the members of the New Jersey bar, the Special Committee's 1995 report acknowledged that there was still a greater need for voluntary pro bono services in New Jersey. Coogan, *Pro Bono Attorneys: A Sampler* at 22. Clearly, under these circumstances, the State of New Jersey has a legitimate interest in encouraging New Jersey attorneys to volunteer for pro bono and other worthy community causes.

It is reasonable to assume that attorneys that maintain a bona fide office in New Jersey are more likely than those who do not to perform voluntary pro bono and to provide other needed services to the communities where their offices are located. For example, an attorney who maintains his or her only office in Albany, New York, and who only practices sporadically in New Jersey, will rarely, if ever, take on a pro bono assignment in New Jersey. On the other hand, a lawyer that maintains a bona fide office in New Jersey will be more inclined to join the local bar association, become involved in pro bono and charitable organizations, and otherwise volunteer his or her services to those in the community where the lawyer's office is located.[9] Therefore, the bona fide office requirement is

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[9] Moreover, if the bona fide office requirement is struck down as unconstitutional, the New Jersey Supreme Court will be forced to restructure its mandatory pro bono distribution system. Assignment judges will no longer be able to assign matters just to those lawyers who maintain an office within their county. Members of the New Jersey bar might then be required

rationally related to the state's legitimate interest in encouraging voluntary pro bono participation by New Jersey attorneys.[10]

3. The Skills And Methods Course Requirement Is Also Rationally Related to a Legitimate State Interest

Petitioner Tolchin argues that the skills and methods course requirement imposes an unconstitutional burden upon non-resident New Jersey lawyers. Specifically, he contends that there is no reason why he and other non-residents should be forced to attend the skills and methods class at one of the four locations in New Jersey where the course is offered. *Petition* at 13.

It is undisputed that New Jersey has a legitimate interest in ensuring the competency of those who practice

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to take on pro bono assignments in counties where they otherwise would not ordinarily practice and which may impose a more significant burden than pro bono representation would otherwise.

[10] The NJSBA recognizes that a majority of this Court rejected a somewhat similar argument in both *Piper* and *Friedman*. In each of those cases, however, the legitimate interest in encouraging pro bono service was judged against the heightened scrutiny standard of the Privileges and Immunities Clause and, accordingly, the majority in both cases found that the residency requirements at issue were not the least-restrictive means of meeting the states' interest. Here, as explained above, the Court need not consider whether there exists a less-restrictive means of achieving the desired result under the *Pike/Brown* balancing test. Instead, the bona fide office requirement must only be rationally related to the state's legitimate interest in encouraging voluntary pro bono service.

law in New Jersey[11] and that the skills and methods requirement applies to all newly-admitted attorneys regardless of where they are domiciled. It is also undisputed that the skills and methods course is designed to teach basic skills usually not taught in law school that new lawyers must have to effectively practice law in New Jersey. On three previous occasions, this Court has extolled the virtues of mandatory continuing legal education requirements. *See Piper*, 470 U.S. at 285 n.19; *Friedman*, 487 U.S. at 69; *Frazier*, 482 U.S. at 648.

Tolchin's sole objection to the skills and methods course requirement is that he must attend the courses at one of the four course sites located in New Jersey. Of course, he concedes that Newark, New Jersey, one of the four location sites, is readily accessible to him. *Petition* at 6. In fact, the only example he can offer of any impact that the skills and methods requirement may have on interstate commerce is his proposed hypothetical situation in which a newly-graduated lawyer accepts a judicial clerkship in Louisiana and wants to return to New Jersey to practice law after the clerkship ends. Tolchin argues that the skills and methods requirement would bar that person from the practice of law. *Petition* at 13-14. In that very rare instance, however, can there be any serious question that the attorney would be allowed to begin the skills and methods course upon his or her return to the

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[11] Notably, the New York state courts, Tolchin's home state, have just announced a requirement that all newly-admitted attorneys must complete 32 hours of approved CLE courses over two years.

area? The mere statement of this question rebuts the unreasonableness of such an interpretation.

As the Third Circuit rightfully noted, the burden of traveling to the course location applies to all attorneys, regardless of where they reside. As the Third Circuit further explained, the burden in many cases is greater on New Jersey residents than upon non-residents, such as Tolchin, who can easily commute to the course location. Accordingly, there is no unconstitutional burden on non-residents to attend the skills and methods classes offered in New Jersey as a condition of their eligibility to practice law in New Jersey.

CONCLUSION

For the foregoing reasons, *amicus curiae*, the New Jersey State Bar Association, respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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October 3, 1997

MOTION FILED

OCT - 6 1997.

(6)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

No. 97-209

ROBERT J. TOLCHIN,
individually and on behalf of all others similarly situated,

Petitioner,

v.

THE SUPREME COURT OF NEW JERSEY, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF MICHAEL S. FETTNER, ESQUIRE, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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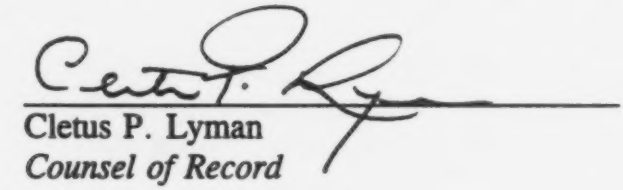
MOTION OF MICHAEL S. FETTNER, ESQUIRE,
FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE IN SUPPORT OF PETITIONER

Amicus curiae, Michael S. Fettner, Esquire[1], hereby moves, pursuant to Rule 37.4, Supreme Court Rules, for leave to file the accompanying brief in support of petitioner's challenge to New Jersey's *bona fide* office rule, R. 1:21-1(a), petitioner's questions one and two. Amicus has no interest in petitioner's question three, relating to New Jersey's skills and methods courses.

Petitioner and Supreme Court of New Jersey defendants have given their consent to *amicus* to file a brief in support of petitioner; ICLE defendants have not responded to amicus's request for consent.

Amicus has set forth his statement of interest in support of petitioner in his accompanying brief.



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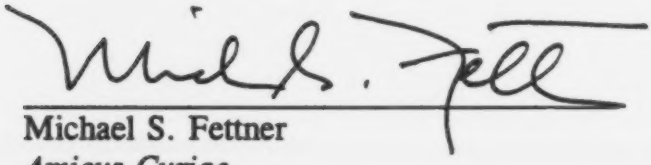

Michael S. Fettner
Amicus Curiae

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[1]Counsel for a party did not author this brief in whole or in part. No person or entity, other than amicus, made a monetary contribution to the preparation and submission of this motion and brief.

Questions Presented

1. Does the Supreme Court of New Jersey rule requiring lawyers to maintain a *bona fide* office within the state in order to practice law violate the Commerce Clause of the U.S. Constitution?

2. Does the Supreme Court of New Jersey rule requiring lawyers to maintain a *bona fide* office within the state in order to practice law violate the Privileges & Immunities Clause of the U.S. Constitution?

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BRIEF OF MICHAEL S. FETTNER, ESQUIRE, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Michael S. Fettner, Esquire, hereby submits his brief as *amicus curiae* in support of petitioner's challenge to the Supreme Court of New Jersey rule requiring lawyers to maintain a *bona fide* office within the state in order to practice law, R. 1:21-1(a).[2]

Introduction

On the eve of the 21st century, as 15 European nations forge economic and social union, and as the world becomes a "global village" through worldwide communication in "cyberspace," the New Jersey Supreme Court (and members of its bar), construing as broadly as possible its constitutional grant of jurisdiction over the admission to the practice of law, and overlooking New Jersey legislative policies favoring cooperation with Pennsylvania and New York dating back at least to 1783, wishes to regress to the social and economic policies of the Middle Ages, when European craft guilds "enjoyed contiguous monopolies" and "controlled the bulk of trade, labour and production" in European towns.[3]

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[2]Amicus limits his brief to support Mr. Tolchin's challenge to the *bona fide* office requirement only. Amicus has no interest in petitioner's question three, regarding New Jersey's skills and methods classes.

[3]*See respectively*: *Treaty on European Union*, signed at Maastricht, Netherlands, 7 February 1992, Title I, Article B (a Union objective is "the strengthening of economic and social cohesion"); Reno v. ACLU, 519 U.S. ___, 117 S.Ct. 2329, 2334 (1997), affirming ACLU v. Reno, 929 F.Supp. 824 (E.D.Pa. 1996) (describing the character and dimension of the Internet as "a unique medium with content as diverse as human

This Court should grant certiorari to decide this important case under the Commerce Clause and Privileges & Immunities Clause, involving regulation of lawyers in the context of evolving multi-state and multi-national practice, along the rapidly expanding information superhighway. New Jersey lawyers and judges have adopted a rule designed to limit access of lawyers to New Jersey. The rule is beyond the reach of the democratic process, in the most densely populated and largest economic region in the nation.

Upon the 1996 amendment of the *bona fide* office rule, Cynthia M. Jacob, Esquire, then president of the New Jersey State Bar Association, was quoted as saying:[4]

> " . . . the bona fide office requirement ought to be 'strengthened rather than weakened' in the face of an 'invasion' by Philadelphia and New York lawyers."

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thought . . . available to anyone anywhere in the world with Internet access"); *N.J. Constitution*, Article VI, § 2, ¶ 3; New Jersey interstate compacts, N.J.S.A. Title 32 generally; for example, settling boundaries along the Delaware River in 1783, N.J.S.A. 52:28-25; Fernand Braudel, *The Wheels of Commerce*, pp. 314-316 (trans. ed. 1982)("The purpose of the guilds was to bring together the members of a single trade which they defended against all others . . .).

[4]*The Legal Intelligencer*, August 5, 1996, p.31. In a similar vein, see, *New Jersey Lawyer*, June 26, 1996, "Jersey Tells Philly Lawyers: Buzz Off!;" *New Jersey Lawyer*, August 12, 1996, "Invaders Irk South Jerseyans" (reporting that president of Burlington County, NJ, bar association president--also a secretary for New Jersey's District Ethics Committee, District III-B--accused Pennsylvania lawyers of being rude and ignorant of local procedures).

Ms. Jacob's sentiments are not new.

> "For years, New Jersey law firms have moaned that out-of-state law firms, especially those from Manhattan and Philadelphia, have been encroaching on their territory, wooing away their clients. . . In fact, New Jersey made it tough for out-of-staters to come here, by requiring firms to maintain and staff bona fide offices. 143 *N.J.L.J.* 768, 774 (Feb. 26, 1996)."

The real purpose of the rule is economic protectionism.[5] *See*, Richard L. Abel, *American Lawyers*, Chapters 5-7 (1989)(describing history of legal profession's efforts to restrict practice of law, including bans on non-lawyers and limiting supply of lawyers, and self-regulation, including use of ethical rules and disciplinary process for protectionist ends).

The history of New Jersey's rules governing the practice of law shows facial discrimination against out-of-state lawyers and blatant protectionism. In re Sackman, 90 N.J. 521, 448 A.2d 1014, 1017 (1982). The current rule, adopted in response to constitutional challenges to a prior version [in Sackman], does not satisfy constitutional objections, but is a subterfuge masking discriminatory and protectionist intent and effect.

In the face of its explicit recognition that the rule may have an element of protectionism, without a record, while acknowledging the lack of legal checks and balances to

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[5]"Many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition." Smith, *Time for a National Practice of Law Act*, 64 A.B.A.J. 557 (1978).

ensure the rule was not designed primarily to benefit the New Jersey bar, and contrary to holdings of this Court, the Court of Appeals upheld the constitutionality of the office requirement on two unsupported "beliefs" that "there is a satisfactory basis to find a rational relationship between the bona fide office requirement and the intended benefit of attorney accessibility," and that those lawyers most burdened by the rule "do not constitute a very large class." Tolchin v. Supreme Court of N.J., 111 F.3d 1099, 1109 (3d Cir. 1997).

Statement of Interest of *Amicus Curiae*

Amicus is a resident of Philadelphia, PA.

On November 30, 1988, amicus became a member of the bar of the Supreme Court of Pennsylvania, and on December 19, 1988, became a member of the bar of the Supreme Court of New Jersey.

Amicus is an associate with Lyman & Ash, a law firm located in Philadelphia, PA, now made up of four lawyers. Lyman & Ash has a general litigation practice, and regularly handles cases in a variety of areas of law and jurisdictions.[6]

Lyman & Ash was formed in 1972. Until 1988, the

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[6]Recently reported decisions in which Lyman & Ash was involved include this case; McDaniels v. Flick, 59 F.3d 446 (3d Cir. 1995); Squires v. Bonser, 54 F.3d 168 (3d Cir. 1995); Larsen v. Senate, 955 F.Supp. 1549 (M.D.Pa. 1997); Gray v. St. Martin's Press, 929 F.Supp. 40 (D.N.H. 1996); Lyman v. Boonin, 535 Pa. 397, 635 A.2d 1029 (1993); and, von Pein v. von Pein, 268 N.J.Super. 7, 632 A.2d 830 (A.D. 1993).

firm did not handle any case in New Jersey. In 1988 and 1989, members of the firm were admitted pro hac vice in two cases in New Jersey. In 1993, the New Jersey Superior Court, Appellate Division, noted that the firm had done "a superb job" in a fraud conspiracy case. von Pein v. von Pein, 268 N.J.Super. 7, 632 A.2d 830, 836 (A.D. 1993).

In March 1994, the firm opened an office in Camden, NJ.

The New Jersey office is a burden without any corresponding benefit to Lyman & Ash, its clients, the New Jersey public, bench or bar.

The *bona fide* office requirement is vague as written and as interpreted, making compliance difficult.

The office requirement is in effect a tax or tariff, and is a burden because Lyman & Ash pays for additional rent, equipment, telephone and personnel. No one at Lyman & Ash needs or wishes to use this office. The office rule requires lawyers and clerical employees to go back and forth between Philadelphia and Camden.

Amicus's Philadelphia office is approximately three miles from his Camden office and from the Camden County Courthouse. From his Philadelphia office, amicus can reach the courthouse by way of PATCO train service in approximately fifteen minutes. Amicus is closer to the Camden County Courthouse, and can reach the courthouse more quickly and reliably because of the train service, than can other lawyers whose principal office is located in other sections of Camden County, who must rely on motor vehicles to reach the courthouse. Amicus's Philadelphia

office is located closer to courthouses in southern New Jersey than law offices in central and northern New Jersey. Amicus can reach Trenton, New Jersey's capital, by Amtrak in approximately 25 minutes.

Lyman & Ash has made a substantial investment in its Philadelphia office, including computers, a network system, computer software, including accounting and billing programs, filing systems, and training personnel. Lyman & Ash's lawyers, office manager, closed files, modems (with access to the internet) and small library are all in Philadelphia. Amicus prefers to work in his Philadelphia office, to which he walks every morning from his house on the west side of Rittenhouse Square.

The 1996 amendment to the rule added the requirement that a *bona fide* office is a place where clients can be met. This new requirement impinges on the constitutional rights of lawyers and clients to free interstate travel. Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 1329 (1969).

A corollary New Jersey rule (R. 1:21-6) requires that bank records, files, retainer agreements, and accounting records relating to New Jersey work, be kept in a New Jersey office. However, Lyman & Ash's accounting records are handled by its office manager in Philadelphia, and the accounting information is kept on Lyman & Ash's computer system in Philadelphia. Compliance with this book-keeping rule requires creating a second set of records and keeping them in a second office.

Moreover, R. 1:21-6 is absurd given that amicus's New Jersey accounts are with PNC Bank, N.A., headquartered in Pittsburgh, PA. Statements of these

accounts supposedly come from New Jersey (as shown by the return address on the envelope) but in reality, come from Philadelphia, as can be seen from the post-marks.

While the precise requirements of a *bona fide* office are unclear and are subject to interpretation and enhancement by judicial or committee gloss, New Jersey has made purported non-compliance with the rule an ethical violation.

Effective January 2, 1989, R. 1:21-1(a) was amended to add that "an attorney who practices law in New Jersey and fails to maintain a bona fide office there shall be deemed to be in violation of RPC 5.5(a)." Rule 5.5(a), Rules of Professional Conduct, says:

> "A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction."

With the 1989 amendment, a lawyer's compliance with the *bona fide* office rule is now not merely an administrative issue, but an ethical issue. Ethics committees, rather than administrative committees, investigate allegations that a lawyer is not in compliance with the rule. The amendment of R. 1:21-1(a) to make violations a subject of disciplinary action was done to provide an additional tool of harassment and intimidation, and is further evidence of protectionism.

New Jersey has not hesitated to discipline Pennsylvania and New York lawyers for purported non-compliance with the rule. *See*, Matter of Schutzman, 145 N.J. 568, 679 A.2d 151 (1996); Matter of Young, 144 N.J. 165, 675 A.2d 1117 (1996); Matter of Beck, 143

N.J. 308, 670 A.2d 1053 (1996); In re Kasson, 141 N.J. 83, 660 A.2d 1187 (1995).

The rule is used by New Jersey counsel and courts to discriminate against and harass Philadelphia lawyers as part of litigation strategy, including ex parte communications between local attorneys and judges.

For example, on March 1, 1996, amicus was scheduled to appear in Camden County Superior Court before Hon. Charles A. Little to argue discovery-related motions in a pending action. Judge Little was the managing judge of the action. Instead of hearing argument on the motions, Judge Little made false accusations from the bench and in front of a courtroom full of lawyers and litigants, that amicus does not maintain a *bona fide* office in New Jersey in accordance with R. 1:21-1(a). Judge Little said amicus "cannot speak in this Court." Excerpts of a reproduced transcript of the proceeding is attached as Appendix A.

Judge Little's accusations sprang from erroneous information he received ex parte from opposing counsel, who had supplied him with a secret "affidavit." Judge Little directed counsel to provide this "affidavit" to himself and also directed counsel not to serve it on amicus.

Argument

1. New Jersey's *bona fide* office requirement violates the Commerce Clause.

U.S. Constitution, Article I, § 8, clause 3, empowers Congress to regulate commerce among the several states. "In its negative aspect, the Commerce Clause prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors [internal quotations and citations omitted]." Fulton Corp. v. Faulkner, 516 U.S. ___, 116 S.Ct. 848, 853 (1996).

A purpose of the dormant Commerce Clause is "to prevent a state from retreating into economic isolation . . . as it would do if it were free to place burdens on the flow of commerce across its borders that commerce within those borders would not bear." Id.

The Commerce Clause forbids discrimination, whether forthright or ingenious. It is the court's "duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 114 S.Ct. 2205, 2212 (1994)(internal quotations and citations omitted).

Faulkner held unconstitutional, North Carolina's "intangibles tax," assessed on a fraction of the value of corporate stock owned by North Carolina residents inversely proportional to the corporation's exposure to the state's income tax.

West Lynn struck down a Massachusetts statute

protecting in-state milk producers, designed to preserve local industry ensuring continuous and adequate supply of fresh milk. Also, Lewis v. BT Inv. Man. Inc., 447 U.S. 27, 42, 100 S.Ct. 2009, 2018-2019 (1980) (under dormant Commerce Clause, struck down Florida statute favoring in-state over out-of-state entities in investor services market); generally, Tribe, *American Constitutional Law*, § 6-12, "State Regulation which discourages Multi-State Business Structures" (2d Ed. 1988).

Faulkner, 116 S.Ct. at 855 n.3, cited Halliburton Oil Well Co. v. Reily, 373 U.S. 64, 72, 83 S.Ct. 1201, 1205 (1963), holding that "a state may not impose a tax which discriminates in favor of the local merchant so as to encourage an out-of-state operator to become a resident in order to compete on equal terms [internal quotations and citation omitted]."

Camps Newfound/Owatonna v. Town of Harrison, ME, 519 U.S. ____, 117 S.Ct. 1590, 1598-1601 (1997), held an otherwise generally applicable state property tax violates the Commerce Clause if its exemption for property owned by charitable institutions excludes organizations operated principally for the benefit of out-of-state residents.

The dormant Commerce Clause analysis in Tolchin confused discrimination against interstate commerce with residency status, which is the analysis under Privileges & Immunities. The court said that petitioner's "argument fails to implicate the Commerce Clause because such attorneys may be New Jersey residents as well as nonresidents" (111 F.3d at 1108):

"Any incidental discrimination caused by the bona fide

office requirement is not based on residency status but on the size and type of an attorney's practice."

Lyman & Ash is an out-of-state economic interest because the firm's lawyers practice in Philadelphia.

The *bona fide* office requirement discriminates against interstate commerce by increasing the cost out-of-state lawyers incur doing business in New Jersey; the rule particularly discriminates against small firms, like Lyman & Ash, because of the increased cost of practicing required by a second office and accompanying services, equipment, supplies, personnel. Requiring a second office does not advance any public policy or interest, but is a boon-doggle to New Jersey real estate interests.

The *bona fide* office requirement is parochial. Political boundaries are irrelevant to the ways in which commerce flows and people move.[7]

U.S. metropolitan areas have been designated by the U.S. Office of Management and Budget ("OMB") as metropolitan statistical areas ("MSA"), consolidated MSA's (CMSA"), and primary MSA's ("PMSA"). *Statistical Abstract of the U.S.*, 1995, U.S. Department of Commerce, Bureau of Census, September 1995, pages 960-961, 967; *Federal Register*, Vol. 55, No. 62, Friday, March 30, 1990, Part VI, OMB, "*Revised Standards for Defining Metropolitan Areas in the 1990's; Notice.*"

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[7]For example, recent statistics show that three percent of the U.S. population moves to another state each year; nearly eighteen percent move its residence annually. Sullivan, *Moving Day Involves More than Furniture*, 45 MANAGE, April 1994, p. 14.

The general concept of a metropolitan area is that of a core area containing a large population nucleus, together with adjacent communities having a high degree of economic and social integration with that core.

OMB has designated five counties in Pennsylvania--Bucks, Chester, Delaware, Montgomery and Philadelphia--and four in New Jersey--Burlington, Camden, Gloucester and Salem--as the "Philadelphia, PA-NJ" PMSA.

These designations show the high degree of economic and social integration of Philadelphia and southern New Jersey. Such integration is amply shown by various regional organizations that operate in New Jersey and Pennsylvania, and compacts between the two states. Examples include:

** New Jersey's Solid Waste Management Act charges its Environmental Protection Department to cooperate with counterparts in New York and Pennsylvania in developing regional regulations for handling medical waste. N.J.S.A. 13:1E-48.19.

** On May 12, 1994, Pennsylvania and New Jersey formally unified their Delaware River port agencies, creating the Port of Philadelphia and Camden, in order to secure employment in the region, develop regional master plans, and help the region build an integrated ship-rail-highway transportation network. Delaware River Port Authority, N.J.S.A. 32:3-2, *et seq.*

** New Jersey and Pennsylvania created the Delaware Valley Urban Area Compact, N.J.S.A. 32:27-2, comprised of four New Jersey counties and five Pennsylvania counties, and the Delaware Valley Regional Planning

Commission, N.J.S.A. 32:27-8, for the purpose of organizing and conducting "a continuing, comprehensive, co-ordinated regional planning program for the area, including but not limited to transportation planning." N.J.S.A. 32:27-3.

** New Jersey and Pennsylvania agreed to "concurrent jurisdiction within and upon the water of the Delaware River" in 1783, six years before the U.S. Constitution was ratified. N.J.S.A. 52:28-25.

** In addition to compacts with New York, Pennsylvania and Delaware, New Jersey has entered into several multi-state compacts, including Atlantic States Marine Fisheries (32:21-1); Vehicle Equipment Safety (32:26-1); Air Pollution Control (32:29-2); and, Pest Control (32:30-1). Generally see, Title 32 of New Jersey Statutes Annotated for interstate compacts.

** New Jersey created a "Central-Atlantic Region," under its banking and savings and loan statutes, including Pennsylvania, Delaware and District of Columbia (New York is not included), to provide for reciprocity in operation and acquisition of certain lending institutions. N.J.S.A. 17:12B-278. Interstate banks, including PNC Bank, N.A., have multi-state operations, including in NJ and PA.

** Bell Atlantic is the regional local telephone company, providing service in Pennsylvania, New Jersey, New York, New England, Delaware and Maryland.

** According to an analysis published in *The Philadelphia Inquirer*, on May 26, 1996, about 32% of New Jersey shore property south of Barnegat Light to

Cape May Point, is owned by Pennsylvanians.

Office requirements benefits the economic interests of resident lawyers by increasing the costs of out-of-state competitors, who are thereby discouraged from practicing in New Jersey. In-state lawyers protect themselves from increased competition. The New Jersey public is thus apt to pay more for legal services and to have its choice of lawyers limited.

2. New Jersey's *bona fide* office requirement violates the Privileges & Immunities Clause.

While the *bona fide* office requirement is expressly neutral, as between residents and nonresidents, its effect overwhelmingly burdens nonresidents. As Sackman held (448 A.2d at 1020):

> " . . . we assume that practically the overwhelming majority of attorneys have their principal office in the state where they live."

New Jersey residents overwhelmingly would have their offices in New Jersey with or without the rule. Amicus and other nonresidents would not have New Jersey offices but for the rule. Overwhelmingly, lawyers need an office to practice law. But they do not need two. New Jersey residents would overwhelmingly have offices in New Jersey from which they could practice law in New Jersey, New York, Pennsylvania or the 47 other states. Philadelphia lawyers would overwhelmingly carry on their New Jersey practices from their Philadelphia offices.

Article IV, § 2, of the U.S. Constitution, says "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Clause was intended to fuse into one nation a collection of independent, sovereign states. Toomer v. Witsell, 334 U.S. 385, 68 S.Ct. 1156 (1948).

The Clause "establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment." Austin v. New Hampshire, 420 U.S. 656, 660, 95 S.Ct. 1191 (1975).

New Jersey's *bona fide* office requirement is at odds with precedent of this Court: Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S.Ct. 1272 (1985); Frazier v. Heebe, 482 U.S. 641, 107 S.Ct. 2607 (1987); Supreme Court of Virginia v. Friedman, 487 U.S. 59, 108 S.Ct. 2260 (1988); Barnard v. Thorstenn, 489 U.S. 546, 109 S.Ct. 1294 (1989).

The only basis for the office requirement sustained by the Court of Appeals was availability to courts, clients and counsel, relying on In re Kasson, 141 N.J. 83, 660 A.2d 1187 (1995). However, this Court has rejected availability as a reason for discrimination.

> "There is no more merit to [New Hampshire's] assertion that a nonresident member of the bar at times would be unavailable for court proceedings." Piper, 105 S.Ct. at 1279-1280.
>
> "We further conclude that any need the court may have to ensure the availability of attorneys does not justify the in-state office requirement. As observed

with regard to state residency requirements, there is no link between residency within a State and proximity to a courthouse." Frazier, 107 S.Ct. at 2613.

Barnard rejected this ground, relying mainly on Piper, but in more compelling circumstances, because the Virgin Islands is so far from the U.S. mainland. If Barnard rejects discriminatory residency requirements based on "geographical isolation" and inadequate levels of competence of nonresidents in local law based on "lack of access to local statutes, regulations and court opinions," *a fortiori* for Philadelphia lawyers practicing in New Jersey out of their Philadelphia offices.

Reliance on Kasson was misplaced, in that the requirement of a Pennsylvania lawyer to have two offices created the availability problem in the first place. Had the New Jersey judge looking for atty. Kasson called his Pennsylvania office, he would have found Kasson there. Neither New Jersey nor the Court of Appeals has said what "availability" means.

Paradoxically, Ms. Jacob complains about an "invasion" of Philadelphia and New York lawyers to New Jersey, while the Court of Appeals held the office requirement is necessary to ensure the availability in New Jersey of these very same invading lawyers!

Had the lower courts permitted those challenging the rule to develop an evidentiary record, the record would have shown numerous examples of harassment and discrimination, including:

** opposing counsel use the *bona fide* office "card" as a litigation tactic;

** lawyers are "grilled" in open court by judges about their New Jersey office;

** lawyers are asked by judges how much time they spend in their New Jersey offices;

** attorneys fees awarded in a class action were held in escrow by a New Jersey judge pending determination by the Superior Court of the "bona fideness" of a lawyer's New Jersey office[8];

** sole practitioners have been harassed by investigators and have closed their New Jersey offices;

** lawyers are quizzed by a judge about their New Jersey telephone numbers; and,

** Superior Court judges announce in open court that they will refer lawyers whom they think may not be in compliance with the *bona fide* office requirement to ethics committees for investigation, in flagrant violation of lawyers' rights to confidentiality under New Jersey law, R. 1:20-9, and New Jersey's scheme for investigating allegations of ethical misconduct. R. 1:20 et seq.

Such judicial conduct is intended to discourage nonresident lawyers from practicing in southern New Jersey, thereby increasing business for resident lawyers.

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[8]*See*, *New Jersey Lawyer*, February 19, 1996, "What's a Bona Fide Office Worth? Try $170,000," p. 10. Judge Barry Weinberg's conduct, without jurisdiction, was particularly outrageous in light of the quality of work performed by the Philadelphia firm for the benefit of New Jersey residents. Strawn v. Canuso, 140 N.J. 43, 657 A.2d 420 (1995).

The effect is to diminish the competition faced by out-of-state lawyers, to the benefit of resident lawyers, but to the detriment of the New Jersey public, bench and bar, and the overall administration of justice in New Jersey.

There are 11 law schools in New York City, 4 in the Philadelphia area (not counting Rutgers-Camden), and only two in New Jersey (Rutgers, with two branches, and Seton Hall).

New Jersey apparently is afraid of this vast pool of lawyers and legal learning on its northern and southern borders. But such legal resources, derived through cross-pollinization of ideas, practices and experiences of lawyers from many jurisdictions, are a benefit to the New Jersey public, bench and bar. Competition elevates the level of practice and thereby improves the quality of justice.

Piper recognized that out-of-state lawyers, unafraid to champion unpopular causes, are beneficial to a state and good for the "maintenance or well-being of the Union." 470 U.S. at 284. Indeed, the term "Philadelphia lawyer" was coined as a result of just such a cause, when, in 1735, Alexander Hamilton, a leader of the Philadelphia bar, defended John Peter Zenger in New York, in colonial America's most famous freedom of speech case.[9]

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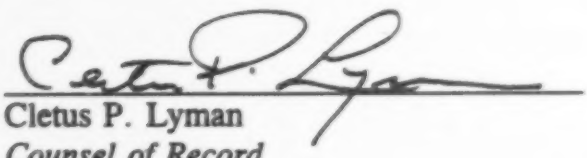
[9]See, *Encyclopedia of the American Constitution*, Vol. IV, "Zenger's Case" (1988).

The U.S. District Court for the District of New Jersey is familiar with the anomaly created by the office rule. The district court had an in-state office requirement until 1987, when the rule was invalidated by Frazier. Since then, amicus can practice in New Jersey federal court from Philadelphia, but in order to practice in New Jersey state court, must have a *bona fide* office in New Jersey.

Conclusion

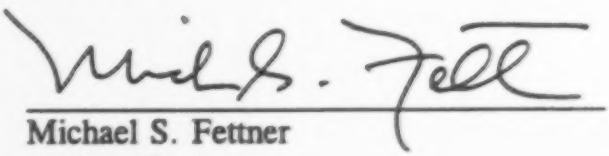
Amicus curiae Michael S. Fettner asks this Court to grant certiorari and to reverse the May 2, 1997, judgment of the Court of Appeals.

Dated: October 22, 1997.



Cletus P. Lyman
Counsel of Record

Dated: October 6, 1997.



Michael S. Fettner
Amicus Curiae

Appendix A

Excerpts from transcript of "discovery hearing" held March 1, 1996, in *Winokur et al. v. Princeton Insurance Company, et al.*, No. L-1733-95, Superior Court of New Jersey, Camden County, Law Division.

"THE COURT: Winokur versus Princeton.

* * *

"MR. McGUIRE: Thomas F. McGuire, for the plaintiffs.

"MR. FETTNER: Michael S. Fettner, also for plaintiffs.

"MS. FARRELL: Megan Farrell, from Parker, McCay & Criscuolo, on behalf of defendant, Princeton Insurance Company.

* * *

"THE COURT: Before we start, Mr. Fettner, I ask you, Sir, do you have a New Jersey office?

"MR. FETTNER: Yes.

"THE COURT: Where?

"MR. FETTNER: 411 Cooper Street.

"THE COURT: Your phone number at that office?

"MR. FETTNER: 342-9719.

"THE COURT: Is that the elevator number?

"MS. FARRELL: I believe so, Your Honor.

"MR. FETTNER: Is that the elevator number?

"THE COURT: Telephone number that you give answers to the elevator at Cooper Hospital.

"MR. FETTNER: 342-9719?

"THE COURT: 9719 -- 342-9719, at the office that you give, 411 Cooper Street is a receptionist. Your name does not appear on the front door or on the inside door. Receptionist states: "You do not have an office there. That it was a mail drop." And, I ask, Sir, is that true or is that false?

"MR. FETTNER: We have an office there, Your Honor, that's in conformity with the bona fide office requirement under the rule. We have -- our name is on the -- when you walk inside the vestibule of it -- of the building, there's a plaque that has a listing of the firms and our name is on there. To my knowledge, Your Honor, I don't understand why 342-9719 doesn't ring up a line at 411 Cooper Street.

"THE COURT: I don't either, but there is a question, and I am directed, if it's not already been done, that the matter be referred to the Ethics Committee as to the bonafideness of Mr. Fettner's in the State of New Jersey, and under Rule 1:21-1, in my rule book that is in my chambers, that that rule has not been complied with, therefore, because of that, any response to motions today will be Mr. McGuire since he is New Jersey Counsel. He does have a bona fide office. Has practiced here for many years. I refer you to Rule 1:21-1 . . .

* * *

It has been brought to my attention that yesterday, the day before yesterday, an attempt was made to deliver pleadings to the Cooper Avenue -- Cooper Street address. You were not there. The individual dropping the mail was told that you do not have an office there and that it was a mail drop for you.

As a Judge of the Superior Court of New Jersey, I have an obligation, unless someone else will do so, to report this matter to the Ethics Committee, and you cannot speak in this Court until the matter is resolved."

Certificate of Service

Undersigned *amicus curiae* hereby certifies that two copies of the foregoing brief were served upon counsel for petitioner and respondents, via first-class mail, on October 6, 1997.

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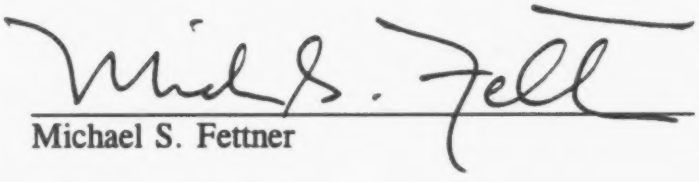

Michael S. Fettner